Supreme Court, U.S.
FILED

No. _____

95 1257 FEB 6 - 1996

In The

Supreme Court of the United States

October Term, 1995

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of HELEN FALLINI as sole heir of HELEN FALLINI; deceased; as executor of the Last Will of HELEN FALLINI; as Trustee of the HELEN FALLINI Living Trust; and the HELEN FALLINI Living Trust as the sole distributee of the Last Will of HELEN FALLINI,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an ongoing regulation of indeterminate duration results in a taking of private property in contravention of the Fifth Amendment, and where there is no problem of notice to defendant, stale claims, or lost evidence, is it consistent with the temporary taking doctrine of *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), to limit the period for filing a claim under the Tucker Act to six years from the effective date of the regulation?

To paraphrase Justice Felix Frankfurter, this case raises the question of when a cause of action for a regulatory taking is born, if it proliferates, and when it dies. *United States v. Dickinson*, 331 U.S. 745, 748 (1947). Are the temporary takings which arise from ongoing regulations of indeterminate duration to be treated, for statute of limitations purposes, as indistinguishable from takings which result from direct or inverse condemnation?

Susan and Joseph Fallini possess numerous vested water rights under Nevada law, pursuant to which they pump water to the surface and store it in tanks for the watering of their livestock. These wells are located on federal lands in accordance with range improvement permits and grazing permits issued by the United States.

Ever since the enactment of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, the Fallinis have been prohibited by the United States from excluding wild horses from consuming their livestock water supplies. As a result, the Fallinis have lost, and continue to lose, significant amounts of water which is of

QUESTIONS PRESENTED – Continued

great value and importance to their livestock operation in the arid lands of Nevada.

In 1992, after pursuing three other lawsuits in an effort to make the government control the wild horse population, the Fallinis filed suit in the Federal Court of Claims seeking compensation for property taken in violation of the Fifth Amendment to the United States Constitution. Disregarding the Fallinis' insistence that under *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992) the court must look to Nevada law to determine the nature and extent of the Fallinis' water rights and their entitlement to the water produced pursuant to those rights, the Court of Claims found against the property owners on the merits.

On appeal to the Court of Appeals for the Federal Circuit, the Fallinis argued that the Court of Claims had erred in concluding that under the Taylor Grazing Act and the permits issued pursuant to that act, the Fallinis had no vested property rights which were taken as a result of the Wild Free-Roaming Horses and Burros Act. As they had in the Court of Claims, the Fallinis argued that under *Lucas*, the court must look to state law to determine the nature and extent of their property rights.

After oral argument, the Court of Appeals vacated the judgment of the Court of Claims and remanded to that court with instructions to dismiss the complaint as untimely under the Tucker Act's statute of limitations.

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DECISIONS BELOW

The decision of the United States Court of Appeals, Federal Circuit, is reported at 56 F.3d 1378 (Fed.Cir.1995), and is reproduced in the Appendix (App. 2). The decision of the United States Court of Federal Claims is reported at 31 Fed.Cl. 53 (1994), and is reproduced at App. 17.

JURISDICTION

The decision of the United States Court of Appeals, Federal Circuit, was entered on June 8, 1995. Petition for rehearing was denied and suggestion for rehearing in banc was declined on November 8, 1995. (App. 54) This court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

(a) U.S. CONST. amend. V.:

> . . . [N]or shall private property be taken for public use, without just compensation.

(b) Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1333(a):

> . . . The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, . . .

(c) 28 U.S.C. § 2501:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT OF THE CASE

Under the common and statutory law of the State of Nevada, appellants possess various vested water rights pursuant to which they have developed a number of water sources on federal lands for the watering of their cattle. Appellants' cattle graze on federal lands under grazing permits issued by the Department of Interior pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.*, and appellants' water sources on federal lands have been developed in accordance with range improvement permits issued pursuant to that Act.

In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, which was intended to protect wild horses and burros as "living symbols of the historic and pioneer spirit of the West." § 1331. The Act directed the Secretary of Interior to "protect and manage wild free-roaming horses and burros as components of the public lands, . . . " § 1333(a). Pursuant to this authority, the Secretary of Interior adopted regulations which prohibited appellants from excluding wild horses from consuming water which appellants had produced for their cattle.

In 1992, after nearly two decades of disagreement and litigation between appellants and the federal government over the administration of the Wild Free-Roaming Horses and Burros Act, in the course of which the government was required to create a Herd Management Area to regulate the number of horses present on appellants' allotment, (App. 20), appellants filed a complaint in the United States Court of Federal Claims seeking compensation for the value of their property interest in water taken in contravention of the Fifth Amendment to the United States Constitution. The Court of Federal Claims, which had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, concluded that appellants had no compensable property interest under federal law and found for the government on the merits. *Fallini v. United States*, 31 Fed.Cl. 53 (1994) (App. 17).

Appellants appealed the trial court decision to the Federal Circuit Court of Appeals pursuant to 28 U.S.C. § 1295(a)(3). On appeal, appellants relied upon this court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), in arguing that the Court of Federal Claims had erred in looking to federal rather than state law to define the extent of appellants' property rights. The Federal Circuit did not reach the merits, however. On the theory that appellants' cause of action accrued when the Wild and Free-Roaming Horses and Burros Act was enacted, the court vacated the judgment of the Court of Federal Claims with instructions to dismiss the complaint as untimely filed under the six year statute of limitations of 28 U.S.C. § 2501. *Fallini v. United States*, 56 F.3d 1378, 1383 (1995) (App. 2).

Appellants petitioned for rehearing and in the alternative suggested a rehearing in banc. In their petition appellants contended that the Federal Circuit's ruling on the statute of limitations failed to recognize the distinction between regulatory takings, on the one hand, and takings by eminent domain or inverse condemnation, on the other hand. Relying upon the temporary takings doctrine of *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), appellants argued that at a minimum they should be able to recover for the regulatory takings which occurred during the six years prior to the date on which their claim was filed. The Federal Circuit denied appellants' petition for rehearing and declined the suggestion for rehearing in banc. 56 F.3d at 1378 (App. 2, 54).

REASONS FOR GRANTING THE WRIT

The Federal Circuit's order to the Court of Federal Claims to dismiss appellants' Fifth Amendment takings claim as untimely filed is inconsistent with this court's temporary taking doctrine as explicated in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* and with the general purposes of statutes of limitations. As a consequence, appellants and other property owners are without remedy in the federal courts for significant violations of their rights under the Fifth Amendment to the United States Constitution.

I. IN THE INTEREST OF FAIRNESS AND JUSTICE, THIS COURT SHOULD ARTICULATE STANDARDS WHICH ASSURE THAT THE STATUTE OF LIMITATIONS APPLICABLE TO REGULATORY TAKINGS CLAIMS UNDER THE FIFTH AMENDMENT ARE INTERPRETED AND APPLIED CONSISTENT WITH THIS COURT'S REGULATORY TAKINGS JURISPRUDENCE.

As Justice Frankfurter stated in *Dickinson v. United States*, 331 U.S. 745, 748 (1946), "[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' . . . " Congressional enactments which define the nature and scope of judicial remedies for violations of Fifth Amendment rights should be interpreted consistent with this principle of fairness. Because the decision below is based upon precedent which does not recognize the important distinction between a temporary taking and a direct or inverse condemnation, it fails to satisfy the Fifth Amendment fairness principle.

This court's decision in *Dickinson* satisfied the fairness principle by tolling the statute of limitations until the harm from a taking stabilized. Where the government chose "not to condemn land but to bring about a taking by a continuing process of physical events," the *Dickinson* court sought to relieve the property owner of the need "to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.' " 331 U.S. at 749.

Citing *United States v. Dow*, 357 U.S. 17 (1958), the court below noted that the *Dickinson* stabilization doctrine has been interpreted narrowly to apply only to "a

taking by flooding 'when it was uncertain at what stage in the flooding operation the land had become appropriated to public use.' " 56 F.3d at 1381. (App. 9) But, while *Dickinson* clearly articulates the principle of fairness pursuant to which "procedural rigidities should be avoided" in the application of statutes of limitations, 331 U.S. at 749, it is not the precedent which should control in this case.

The difficulty which the plaintiff faced in *Dickinson* was "determining the decisive moment in the process of *acquisition by the United States* when the fact of taking could no longer be in controversy." (emphasis supplied) 357 U.S. at 748. This court's response to the unfairness to affected property owners was the "wait-and-see-how-much-is-taken rule" of *Dickinson*. *Hilkovsky v. United States*, 504 F.2d 1112, 1114 (Ct.Cl. 1974). The difficulty which the plaintiff faces in this case is that their property is subject to an ongoing, temporary taking of indeterminate duration. This court has not yet had occasion to conform statute of limitations application to the temporary takings doctrine of *First English*.

Dickinson was an inverse condemnation case. The instant case involves a regulatory taking. Understanding the difference is essential to a fair interpretation of the statute of limitations as applied to Fifth Amendment takings claims. As the decision below evidences, the fairness required by the Fifth Amendment will be realized only if this court articulates a standard which recognizes the critical difference between a regulatory taking and a condemnation.

It is not surprising that the Federal Circuit and other courts have looked to the continuing injury or stabilization doctrine of *Dickinson*, whether faced with cases of inverse condemnation or regulatory taking. Until this court's decision in *First English*, it was not clear that a temporary taking required compensation. Most courts assumed that when a regulation went "too far" under the *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), standard for regulatory takings, the government had the choice of paying compensation to acquire the property or rescinding the regulation. By this view, every regulatory taking which was not rescinded resulted in an inverse condemnation. *First English* made it clear that repeal of an offending regulation did not cure the taking which had occurred while the regulation was in effect.

Prior to *First English*, a distinction was sometimes drawn between physical and regulatory takings. But this distinction is not helpful because regulatory takings often result in physical occupation. In *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982), for example, this court found a taking where a New York law required landlords to allow installation of cable television cables on their buildings. Like any regulation, the New York cable television law could be repealed or amended at any time restoring the landlord's right to exclude television cables from their properties. The fact that the regulation resulted in a physical occupation was important not because a taking by physical occupation is different in kind from a regulatory taking, but because physical occupation violates an owner's fundamental right to exclude and is thus an imposition on the property owner of sufficient magnitude to constitute a per se taking under

the ad hoc balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) this court made clear that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

The distinction between physical and regulatory takings fails for a second reason. Prior to *First English* it was often argued "that a regulatory taking, unlike a physical taking, is by its nature 'temporary.' " "It is equally true, however, that the government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property." *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed.Cir. 1991).

But a distinction with an important difference does exist between taking by condemnation (inverse or direct) and taking by regulation. In the former the government acquires title, but not in the latter. Taking by condemnation is permanent or for a definite term. A regulatory taking is by its nature temporary in the sense that repeal of the regulation will automatically restore the status quo with respect to the rights of the property owner.[1] If an

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[1] In *Hendler*, 952 F.2d at 1376, the Federal Circuit suggested that "[a]ll takings are 'temporary' in the sense that the government can always change its mind at a later time." The fact that the government can change its mind does not alter the significance drawn here between taking by condemnation and taking by regulation. Condemned property can be sold, traded or given away, but it will require an affirmative act by the government. It is temporary only if the government chooses to alienate its property interest. A regulatory taking is always

offending regulation is in current effect, it is an ongoing, temporary taking of indeterminate duration. While a regulatory taking limits an owner's rights in property, it does not transfer title to the government.[2]

The significance of this distinction for statute of limitations purposes is this. A court can make a single and reasonably accurate determination of just compensation in a direct or inverse condemnation case. Consistent with the purposes of the statute of limitations affecting takings claims in federal court, this determination is best made within six years of the taking (or of its stabilization in those cases to which the *Dickinson* doctrine applies). In a regulatory taking case, where the taking is ongoing and of indeterminate duration, a court cannot make a single and reasonably accurate determination of just compensation for all injury which may result from the regulation. The court has no way of knowing whether an ongoing regulatory taking will continue indefinitely, be altered by amendment, or be terminated by repeal of the offending regulation.

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temporary. Most important, for the purposes of this petition, is that ongoing regulatory takings are of indeterminate duration.

[2] A regulatory taking may be converted into an inverse condemnation at the government's choice, as in *Lucas v. South Carolina Coastal Commission*. Had South Carolina chosen to rescind its coastal setback regulation, compensation to Lucas for the temporary taking which ended with the repeal of the regulation would have satisfied the Fifth Amendment. Instead South Carolina compensated Lucas for the market value of the regulated properties and thus acquired title to those properties. That South Carolina acquired title was confirmed by the state's subsequent sale of the properties to a private developer.

A direct or inverse condemnation affects a transfer of title to the government which allows a court to determine the full measure of just compensation. Because title is transferred, the full extent of injury occurs at the time of forced transfer and its measure will be the market price of the property at the time of transfer. Market prices reflect current and discounted future value of property. Thus a property owner who believes an inverse condemnation has occurred has six years from "the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy," *Dickinson*, 331 U.S. at 748, in which to make an effective claim for the full extent of the loss resulting from the taking. From the time a cause of action accrues for direct or inverse condemnation, the full extent of the injury to the property owner is knowable and thus determinable by a court.

Takings resulting from ongoing regulation are different. Because the government does not acquire title to property affected by a regulatory taking, the full extent of past and future injury resulting from that taking cannot be determined at any point during a statutory period of six years running from the date of the enactment of the regulation. At any point during or after the statutory period, Congress could have amended or repealed the Wild Free-Roaming Horses and Burros Act, or the Department of Interior could have altered its regulations under that Act. At any time after the resolution of this lawsuit the Act and regulations may be amended or repealed. Any such repeal or amendment will alter the effect of the regulation on appellants' property.

It is impossible for a court to anticipate the effects of such future exercises of legislative and executive power. It would offend the principle of separation of powers for a court to attempt to do so. It is therefore impossible for a court to determine, for all time, the losses affected by an ongoing regulatory taking. For that reason, the statute of limitations must be applied differently to takings resulting from ongoing regulations than to takings which result in a transfer of title to the government. This is so even for ongoing regulations with sunset provisions because such regulations can be amended or repealed before they sunset, or extended after they sunset.

The court below rejected the foregoing analysis as dependent "upon characterizing every drink by every horse as a new and independent federal taking compensable under the Fifth Amendment." 56 F.3d at 1382. (App. 12) The court argues that this would be analogous to a conclusion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) that "[e]very instance of a beachcomber using the public easement" across Nollan's property constitutes a separate taking. But the analogy is inapt for two reasons. First, in *Nollan*, California required dedication to the state of an easement. 483 U.S. at 828. If the state had proceeded to compensate Nollan and thus acquire title to an easement across Nollan's property, the extent of future use by the public would have been of no further legal interest to Nollan. In this case, the appellants have a continuing legal interest, under Nevada law, in the water being consumed by wild horses. Second, the property right affected in *Nollan* is different in kind from that affected in this case. This is a question of state law. *Lucas*, 503 U.S. at 1029. Under Nevada law, which neither of

the courts below have examined, appellants own every drop of water which they capture pursuant to their water right.[3]

The importance of a correct application of the statute of limitations to the particular property interests affected by a taking is well illustrated by a hypothetical variation on the facts in this case. Assume, as in the instant case, that the plaintiff pumps water to the surface pursuant to a water right held under state law. The water is stored in a reservoir for the purposes of watering livestock and irrigating crops. If, in the dark of the night, a tank truck pulls up and drains the water from plaintiff's reservoir, plaintiff will have a civil cause of action to recover the water or damages equal to its value. If the relevant statute of limitations runs before plaintiff files a lawsuit, a court would properly dismiss the claim as untimely filed. If the plaintiff's reservoir is drained a second time, in the dark of another night, will the plaintiff's failure to timely sue in the first instance foreclose plaintiff from seeking recompense for this second or subsequent trespasses? Clearly not. Each draining of the reservoir, even if on successive nights over many years, will constitute a distinct cause of action. Of course this does not mean that plaintiff *must* bring a separate action for each taking. But it does mean that he should not be foreclosed from compensation for future takings on the basis of his having failed to timely file when the very first taking occurred.

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[3] The court below states incorrectly that plaintiffs "contend that under federal and state law they enjoy proprietary right in all the water they produce. . . . " 56 F.3d at 1379 (App. 4). Plaintiffs have always claimed, as they must, that their water rights are based exclusively upon the law of the state of Nevada.

That this analogy to relations between private parties is instructive on the interpretation of the statute of limitations applicable to takings claims against the federal government is clear given the purposes of the waiver of sovereign immunity inherent in the just compensation clause of the Fifth Amendment and in the Tucker Act. While the court below was correct to narrowly interpret the statute of limitations set forth in the Tucker Act's waiver of immunity, it should not have "assume[d] the authority to narrow the waiver that Congress [and the framers of the Fifth Amendment] intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1979).

The waiver of immunity implicit in the Fifth Amendment assures that government trespass upon private property will be treated similarly to private trespass. Just as Anglo-American courts have long insisted that property owners may exclude members of the public from their land, this court has repeatedly insisted upon the Fifth Amendment's role in assuring that individual property owners are not required by government regulation to provide access to the general public. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong v. United States*, 364 U.S. 40, 49." *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994).

In adopting the Tucker Act, Congress was motivated by the blatant unfairness and arbitrariness resulting from government immunity in circumstances where private parties are routinely liable. *Bates Manufacturing Co. v. United States*, 303 U.S. 564, 571 (1938). The Federal Tort Claims Act, 28 U.S.C. 1291 *et seq.*, another general waiver

of sovereign immunity, was likewise motivated by a desire to treat victims of tortious conduct similarly, whether the tortfeasor is a private party or the government. *Richards v. United States,* 369 U.S. 1 (1962). This court recognized the relevance of the analogy to private liability in applying the takings clause of the Fifth Amendment in *Dickinson*. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, *as between private parties,* a servitude has been acquired either by agreement or in course of time." 331 U.S. at 1385. (emphasis supplied)

The effect of the holding below is to foreclose appellants from recovering for trespasses by government for which they could recover had they been committed by private parties. This is an unfair result which does not conform to the noble purposes of the Fifth Amendment.

If the statute of limitations is applied to ongoing regulatory takings of indeterminate duration in the same manner as to condemnations, the government will be required to compensate for the full present value of the affected property discounted into the indefinite future. In other words, the government will have to compensate as if it is acquiring title to the property. But the government does not acquire title by a regulatory taking. If the offending statute or regulation is repealed, the property owner will again be free to use the property to the full extent of the property right extant prior to the imposition of the regulation. If the property owner is compensated as if title has been transferred to the government, the property owner will benefit from a significant windfall at the expense of the taxpayers. If the property owner is compensated as if all losses are incurred between the

enactment of the regulation and the conclusion of the lawsuit, the property owner will not receive just compensation for any future impacts of the regulation.

Thus, it is in neither the government's nor the property owner's interest for the courts to treat regulatory takings as they do takings by condemnation. The government should compensate for no more than it has taken. Indeed the cost of compensation will often, as it should, influence the government's decision with respect to future regulations. A regulation is, by its nature, a temporary constraint on the use of property. It can be repealed or amended at any time. Where that constraint results in a taking, compensation should not exceed the value of what has been taken.

Nor is it fair to the property owner to treat a regulatory taking like a condemnation. A property owner has no way of anticipating the future impacts of a regulation which can be amended or repealed at any time. Neither do the courts have any way of determining such future impacts. If the appellants in this case had filed their claim within six years of the enactment of the Wild Free-Roaming Horses and Burros Act, how would the trial court have calculated just compensation for any property taken? It would not be sufficient to compensate only for that amount of water consumed by the horses up to the time of the court's decision, because the horses would continue to consume water so long as the regulation remained in effect. How would the appellants have been compensated for any future losses resulting from the government's regulation? The court might have ordered compensation based upon the discounted future value of taken water on the assumption that the horses would

continue to consume water at the same rate into the indefinite future. But that approach would lead to a clearly erroneous result on the facts in this case. The amount of water consumed by the horses during the first six years after enactment of the Act was far greater, on an annual basis, than the amount of water consumed during the years after the Bureau of Land Management's drastic reduction in the size of the herd which resulted from the forced creation of a Herd Management Area in 1986. The appellants would have been overcompensated precisely because the application of the law changed in 1986 a fact recognized by the Court below. (App. 9). That application might be changed again at any time in the future. The Act itself might be amended or repealed at any time in the future.

As both the facts in this case and the preceding hypothetical variation on those facts demonstrate, it is impossible to measure, at a single point in time, all of the losses resulting from an ongoing regulatory taking. If the statute of limitations is interpreted to require that losses from a regulatory taking be determined at a single point in time, for all time, the courts will seldom achieve the constitutionally mandated requirement of just compensation. Sometimes the property owner will be undercompensated and sometimes the government will pay too much. In the aggregate it may balance out over time and property owners, but the Fifth Amendment is about justice to individual property owners, not about just compensation on average.

It might be argued that courts face a choice between adhering to a date certain for guessing at the indeterminate compensation due for an ongoing regulatory taking

and requiring owners of affected properties "to resort . . . to piecemeal . . . litigation to ascertain the just compensation for what is really 'taken.' " *Dickinson*, 331 U.S. at 749. But this choice is founded on what is surely the unacceptable assumption that the government will not comply with its responsibilities under the Fifth Amendment except when sued by property owners and ordered to compensate by a court. Under a constitution based upon the rule of law, it must be assumed that the government will voluntarily meet its obligations under the Fifth Amendment. When the government believes, as it does in this case, that no taking has resulted from its regulations, litigation may be necessary. But if, on the merits, the trial court determines that compensation is due for past losses suffered by appellants, the government should be expected either to reform or repeal the regulation to the extent necessary to avoid future takings or to voluntarily compensate for any future injury to property resulting from the offending regulation.

II. THE LOWER COURT'S DISMISSAL OF APPELLANTS' CLAIM AS UNTIMELY FILED IS INCONSISTENT WITH THIS COURT'S LIMITATIONS PRECEDENT AND THUS INSULATES THE GOVERNMENT FROM RESPONSIBILITY FOR ITS VIOLATION OF APPELLANTS' PROPERTY RIGHTS WITHOUT SERVING THE PURPOSES OF THE STATUTE OF LIMITATIONS.

Because of the distinct nature of a takings case involving an ongoing regulatory taking of indeterminate duration, the lower court's dismissal of plaintiffs' complaint does not serve the purposes of the relevant statute

of limitations. As this court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), statutes of limitations

> represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

At issue is whether or not there is a surviving cause of action. As the Supreme Court stated in *Dickinson*, 331 U.S. at 478, "[o]ne of the most theory-ridden of legal concepts is a 'cause of action.' " *Id.* The recognition that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to mention theories,' (citation omitted)," *id.*, is what led this court in *Dickinson* to articulate the stabilization doctrine. Once again, this court should recognize "the danger of determining rights based upon definitions of 'a cause of action' unrelated to the function which the concept serves in a particular situation," *id.* and thus avoid, as in *Dickinson*, rigid adherence to precedent which will preclude the preservation of the "practical and substantial rights" of appellants.

The purpose of the statute of limitations is not to protect the government against liability for the injuries it causes. Rather the purposes are, as indicated in the passage quoted above from *Kubrick*:

> 1. to put the government on notice to defend within a reasonable time,
>
> 2. to free the government from stale claims, and
>
> 3. to protect the government and courts from having to deal with cases where the search for truth is impaired by the loss of evidence.

None of these purposes is served by the dismissal of appellants' regulatory takings claim. The government has a continuing responsibility to enforce the Wild Free-Roaming Horses and Burros Act and thus is well informed of the impacts of that law on affected property owners. The government has regular interaction with appellants in the administration of their grazing permits and the Herd Management Area. Because the regulation is ongoing, there is nothing stale about appellants' claim. The government's actions have daily impacts upon appellants, and will continue to do so as long as the regulation remains in effect. For the same reason, the search for truth cannot be impaired by loss of evidence. The relevant evidence is ready available to the trial court and to defendants, who engage in continuous monitoring of the wild horse population. (App. 20).

The court below was correct in concluding that the *Dickinson* stabilization doctrine did not apply to the facts

in this case. The court erred, however, in rejecting appellants' argument that the government's Wild Free-Roaming Horses and Burros Act resulted in a continuing wrong and that the appellants were entitled to recover for water taken during the six years prior to the filing of the complaint in 1992. The relevant analogy is to be found in the continuing wrong doctrine, which the Federal Circuit has elsewhere distinguished from the stabilization doctrine of *Dickinson*. *Applegate v. United States*, 25 F.3d 1579, 1583 (1994).

The continuing wrong doctrine has been recognized by various federal courts. "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103, 106 (9th Cir. 1983). "[T]he focus of the continuing wrong doctrine should be on the defendants' purported wrongful activities, and not upon the plaintiffs' alleged suffering. Accordingly, if the defendants' activities constitute a continuing or additional violation of the law, then the doctrine applies. . . . " *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507, 1515 (S.D.Fla. 1988) "With respect to statutory or regulatory challenges, we have previously found a continuing violation where regulations continued to be applied to persons within the statutory limitations period." *National Advertising Company v. City of Raleigh*, 947 F.2d 1158, 1167 (4th Cir. 1991). The doctrine has been applied frequently by the Federal Court of Claims in employment and contract cases. See citations in *Applegate v. United States*, 28 Fed.Cl. 554, 563 (1993).

Although the doctrine does not appear to have been applied to regulatory takings, its relevance is underscored by the Fourth Circuit Court of Appeals in its *National Advertising* opinion. Citing to its affirmance in *Virginia Hospital Association v. Baliles* of "a district court holding that '[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations,' " 868 F.2d 653, 663 (4th Cir.), *aff'd*, 496 U.S. 498 (1989), the court described its conclusion as resting "on the holding that 'the limitations period cannot protect an allegedly unconstitutional program.' " 947 F.2d at 1167. While appellants do not assert that the Wild Free-Roaming Horses and Burros Act is unconstitutional, they do claim that the government has a constitutional duty under the Fifth Amendment to compensate for the ongoing taking of water to which appellants have a property right under Nevada law. The statute of limitations should be applied consistent with its purposes, and not so as to insulate the government from liability for ongoing, unconstitutional actions.

III. THIS COURT SHOULD MAKE CLEAR THAT THE ONGOING NATURE OF THE TAKING OF APPELLANTS' PROPERTY IS NOT DEPENDENT UPON THE HORSES BEING AGENTS OR INSTRUMENTALITIES OF THE UNITED STATES GOVERNMENT.

To the extent that the lower court's holding that appellants' claim was not timely filed is dependant upon its conclusion that "the horses are not agents of the Department of Interior," 56 F.3d at 1383, (App. 13) that court has misapplied this court's takings jurisprudence.

The court below states that "[i]f the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking might be different." *id.* This conclusion is clearly mistaken. In *Kaiser Aetna* there was a taking notwithstanding that the private boaters were not agents of the United States. In *Nollan*, the beach front easement was for the use of private persons who were not agents of the State of California. In *Loretto*, the cable company whose cable occupied the side of an apartment house was not an agent of the City of New York.

It is irrelevant to appellants' claim that wild horses which regularly drink water owned by appellants are not agents of the United States. What is relevant is the government's ongoing prohibition of any action by appellants to exclude these wild, free agents from access to their water, if that water is to be used to sustain their livestock.

CONCLUSION

The court below concluded that the Fallinis' cause of action for a regulatory taking died six years after enactment of the Wild and Free-Roaming Horses and Burros Act. The court reached this decision notwithstanding that the regulation in question has resulted in repeated takings of the Fallinis' property over a long period, including during the six years prior to the filing of their claim, and will continue to have that effect for the indeterminate future. The court reached this decision notwithstanding

this court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), requiring compensation for temporary takings.

The decision of the Court of Appeals falls victim to "the danger of determining rights based upon definitions of 'a cause of action' unrelated to the function which the concept serves in a particular situation." *Dickinson*, 331 U.S. at 748. This court should guard against this danger by articulating a statute of limitations rule consistent with recent developments in regulatory takings jurisprudence and with the "principle of fairness" expressed by the Fifth Amendment. *id.*

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: June 8, 1995

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: WILLIAM F. SCHROEDER
PETER A. APPEL

JAMES L. HUFFMAN

FALLINI V US, 94-5110
(CFC - 92-809L)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5110

SUSAN L. FALLINI, and JOSEPH B. FALLINI JR., in each of the following capacities: as an individual person and successor of the interest of HELEN FALLINI as sole heir of HELENE FALLINI, deceased, executor of the last will of HELENE FALLINI, and Trustee of the HELENE FALLINI Living Trust and the HELENE FALLINI Living Trust as the sole distributee of the last Will of HELENE FALLINI,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

William F. Schroeder of Vale, Oregon, argued for plaintiffs-appellants. With him on the brief was *William A. Schroeder,* of Boise, Idaho.

Peter A. Appel, Attorney, Environment and Natural Resources Division, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Lois J. Schiffer,* Assistant Attorney General, *John A. Bryson* and *Dorothy R. Burakrais,* Attorneys. Of counsel was Laura B. Brown, Office of the Solicitor, Department of the Interior, Washington, D.C.

James L. Huffman, Dean and Professor of Law Director, Natural Resources Law Institute, Northwestern School of Law, Lewis and Clark College, of Portland, Oregon, was on the brief for Amicus Curiae, Water for Life, Inc.

Appealed from: U.S. Court of Federal Claims

Judge Harkins

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-5110

SUSAN L. FALLINI, and JOSEPH B. FALLINI JR., in each of the following capacities: as an individual person and successor of the interest of HELEN FALLINI as sole heir of HELEN FALLINI, deceased, executor of the last will of HELEN FALLINI, and Trustee of the HELEN FALLINI Living Trust and the HELEN FALLINI Living Trust as the sole distributee of the last Will of HELEN FALLINI,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: June 8, 1995

Before MICHEL, LOURIE and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

In this Fifth Amendment "takings" case, the Fallinis, who are engaged in cattle ranching in Nevada, argue that the federal government has taken personal property from them without compensation. The Fallinis contend that the government effected a "taking" by requiring them to provide water to wild horses living in the area in which the Fallinis conducted their ranching activities. The Court of Federal Claims ruled against the Fallinis, concluding

on motion for summary judgment that they had no property right that was taken by governmental action. *Fallini v. United States*, 31 Fed. Cl. 53 (1994). We conclude that their complaint was not filed within the applicable statute of limitations period and that the complaint should be dismissed on that ground.

I

The appellants, Susan and Joseph Fallini, own a 2700-acre ranch in south-central Nevada. The Fallinis' ranch property is located within a region known as the Reveille Allotment, which consists of 657,520 acres of federally owned land. Pursuant to federal permits, the Fallinis graze cattle on the public land surrounding their ranch property.

The Fallini family has engaged in ranching in the area since the 19th century. Over time, they have developed a number of water sources on the public land to water the cattle that are permitted to graze there. Although the Fallinis do not own the land where the water sources are located, they contend that under federal and state law they enjoy proprietary rights in all the water they produce from the waterworks that they and their predecessors have constructed.

In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331-1340, which provided for the management and protection of wild horses and burros on public lands. The Act prohibited the removal, destruction, or harassment of wild horses and

burros found on public lands, and it authorized the Secretary of the Interior to issue regulations providing for the management of the wild horses and burros.

In November 1992, the Fallinis filed a complaint in the Court of Federal Claims, contending that the government had taken their property by requiring them "to provide water to wild horses whenever plaintiffs provided water to their domestic livestock after December 17, 1971 [the effective date of the Wild Free-Roaming Horses and Burros Act], on penalty of loss of their grazing preference." The Fallinis' complaint does not describe exactly what the government required them to do in order to "provide water to the wild horses," but they elsewhere assert that they have been prohibited from fencing their water sources in ways that would permit cattle access to the water but prevent wild horses from having access. In their complaint, the Fallinis alleged that between 1971 and 1991 the cost of providing water to wild horses that took water from the Fallinis' developed water sources totaled approximately $1 million.

The Court of Federal Claims granted summary judgment to the government. The court first held that the Fallinis do not own the water they produce in excess of the amounts necessary to satisfy the cattle authorized under their federal grazing permits. The court further concluded that, because the government may regulate the use of the public lands on which the Fallinis' cattle are allowed to graze, the Fallinis "did not have a compensable expectancy in exclusion of wild horses and other wild animals from the allotment or exclusive use of the forage and water." *Fallini v. United States*, 31 Fed. Cl. at 58.

On appeal, the Fallinis contend that the court erred in characterizing their interest in the water that they brought to the surface at the developed water sources on the Reveille Allotment. Based on their claim that they enjoy ownership rights in that water under federal and state law, the Fallinis argue that the government took their property without compensation when it prohibited them from barring the wild horses from drinking water at those sites.

The government responds, first, that the Fallinis failed to file their complaint within the applicable statute of limitations period and that the complaint therefore should be dismissed. On the merits, the government argues that the Court of Federal Claims was correct in ruling that the government had the right to condition the Fallinis' use of the public lands on their not barring the wild horses from having access to the developed water sources.

II

We do not reach the merits of the Fallinis' claim, but instead vacate the judgment of the Court of Federal Claims and direct that court to dismiss the complaint as untimely filed.

The Fallinis brought their claim against the United States under the Tucker Act, 28 U.S.C. § 1491. Actions brought under the Tucker Act are time-barred unless they are filed within six years of the date that the cause of action accrued. 28 U.S.C. § 2501. As a general matter, a cause of action accrues when all the events have occurred that fix the defendant's alleged liability and entitle the

plaintiff to institute an action. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue. *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir.), *cert. denied*, 469 U.S. 826 (1984).

In the present case, the objective standard is clearly met, because the appellants have been cognizant of the facts underlying the alleged taking since long before they filed their complaint in the Court of Federal Claims. The complaint alleges that the uncompensated taking began in 1971, when Congress enacted the Wild Free-Roaming Horses and Burros Act, and has continued since that time.

On October 3, 1983, the Fallinis sent a bill to the Bureau of Land Management seeking compensation for the water drunk by the wild horses. At least by that date, then, the Fallinis were aware of all the facts necessary to establish the liability of the United States for the alleged taking. Unless the Fallinis were justified in delaying the filing of their complaint following that event, their claim is barred because it was not filed in the Court of Federal Claims until 1992, more than six years after the 1983 bill that the Fallinis submitted to the Bureau of Land Management.

The Fallinis advance two theories that, they claim, enable them to avoid dismissal under the time bar. First,

they argue that their complaint was filed within the limitations period because they have experienced a continuous taking over many years and the taking did not stabilize until November 28, 1986, a date slightly less than six years before the filing of their suit. Second, they allege that every drink taken by every wild horse from 1971 through the date of the filing of their complaint constituted a separate taking. Under that theory, the Fallinis would not be able to recover for any water taken more than six years before they filed suit, but they would be entitled to claim compensation for the water taken within the six-year period before their complaint was filed. As we analyze the case, neither of the Fallinis' theories suffices to overcome the limitations bar.

In support of their first theory, the Fallinis claim that they have been subject to a continuous taking under *United States v. Dickinson*, 331 U.S. 745 (1947), and its progeny. *See generally Applegate v. United States*, 25 F.3d 1579, 1581-84 (Fed. Cir. 1994). Under that theory, they contend, their cause of action for the continuous taking that began in 1971 did not accrue until 1986.

In *Dickinson*, the Supreme Court announced the principle that, when the government allows a taking of land to occur by a continuing process of physical events, plaintiffs may postpone filing suit until the nature and extent of the taking is clear. 331 U.S. at 749. The taking in *Dickinson* resulted from the government's construction of a dam that intermittently inundated the property of nearby landowners. Noting that the landowners were uncertain at first how frequently the dam would result in flooding (and thus whether an actual permanent taking

had occurred), the Court in *Dickinson* held that the plaintiffs' cause of action in such a case does not accrue until "the situation becomes stabilized." *Id.*

Dickinson contains language that can be read to suggest that a cause of action for a taking does not accrue until all the damages resulting from the taking can be finally calculated. *See, e.g., Dickinson,* 331 U.S. at 749 (landowner may postpone suit until "the consequences [of the governmental act in question] have so manifested themselves that a final account may be struck"). That interpretation of the *Dickinson* rule, however, would be broader than even the appellants contend for, as it would mean that in a case such as this one, where the damages continue to increase over time, the plaintiffs' cause of action would never accrue and the statute of limitations would never run. *See Gustine Land & Cattle Co. v. United States,* 174 Ct. Cl. 556, 656 (Ct. Cl. 1966) (broad interpretation "would put the *Dickinson* doctrine in unending conflict with the statute of limitations").

The Supreme Court has not read *Dickinson* so expansively. In *United States v. Dow,* 357 U.S. 17, 27 (1958), the Court characterized *Dickinson* as holding only that the statute of limitations does not bar an action for a taking by flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."

Following Dow, the Court of Claims adopted a similarly narrow interpretation of *Dickinson* and the meaning of "stabilization" in the takings context. In *Kabua v. United States,* 546 F.2d 381, 384 (Ct. Cl. 1976), the court noted that in Dow, the Supreme Court "more or less

limited [*Dickinson*] to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking." *Accord Hilkovsky v. United States*, 504 F.2d 1112, 1114 (Ct. Cl. 1974) (*Dow* "distinguished the flooding situation in *Dickinson* from other types of Government taking because, in the slow flooding situation in *Dickinson*, the full extent of the Government taking could not be known until the high water mark of the flooding had been reached"). And in *Barnes v. United States*, 538 F.2d 865 (Ct. Cl. 1976), on facts very similar to those in *Dickinson*, the court held that a taking by flood accrued in 1973 rather than in 1969, the date of the first flood. The court explained that the taking must be dated from the time that "it first became clearly apparent . . . that the intermittent flooding was of a permanent nature." *Id.* at 873. In other post-*Dickinson* cases, the Court of Claims has made clear that it is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues. *Columbia Basin Orchard v. United States*, 88 F. Supp. 738, 739 (Ct. Cl. 1950) ("we do not think the Supreme Court, in the *Dickinson* case, meant to hold that plaintiff was entitled to wait until any possibility of further damage had been removed"); *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251 (Ct. Cl. 1958) (same); *see also Wilcox v. Executors of Plummer*, 29 U.S. (4 Pet.) 172, 177 (1830) (statute of limitations begins to run when breach of duty occurs; "right to sue is not suspended, until subsequent events shall show the amount of damage or loss").

In the case at bar, the "permanent nature" of the taking was evident to the Fallinis at least by 1983, when they sent their water bill to the Bureau of Land Management. The Fallinis maintain that the taking was continuous from 1971 on, but that it did not "stabilize" until November 28, 1986. The only event to occur on or about that date, however, was the formation of the Herd Management Area (HMA) in settlement of one of the Fallinis' prior suits against the government.

The HMA established the historical location and herd population of wild horses in the Reveille Allotment. As part of the settlement, the Bureau of Land Management undertook to conduct an annual census of wild horses in the HMA and to remove any excess horses. Thus, the formation of the HMA served only to reduce the damages the Fallinis were suffering because of the alleged taking; it did nothing to establish that the horses' drinking constituted a taking for which the United States was liable.

Three years before the HMA was established, the Fallinis billed the federal government for the water allegedly taken by the wild horses up to that point. At least by that time, the situation had become clearly apparent, and therefore had "stabilized" within the meaning of *Dickinson*, because the bill that the Fallinis sent to the Bureau of Land Management indicated that they were fully aware of all the facts that, on their view of the case, led to the conclusion that the government's actions amounted to a taking. The only changes in the ensuing years were changes on the number of protected horses in the Reveille Allotment, and thus the amount of water taken. Nothing that happened in those later years had the legal effect of triggering, for the first time, the Fallinis'

obligation to sue for the alleged takings that had occurred since the enactment of the Wild Free-Roaming Horses and Burros Act in 1971. Thus, the Fallinis' first theory does not allow them to avoid the statute of limitations bar.

Under their second theory, the Fallinis concede application of the time-bar as to pre-1986 events, but seek compensation for injury they suffered after 1986, *i.e.*, within the six years prior to the filing of their suit. That claim, however, depends upon characterizing every drink by every wild horse as a new and independent federal taking compensable under the Fifth Amendment.

In analyzing this theory of recovery, it is useful to analogize the conduct at issue in this case to a taking of real property. If a landowner owns a parcel of beachfront property and the government enacts legislation demanding that the landowner allow others to walk along the shore, the government has effected a taking of an easement on the landowner's property. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). For purposes of claim accrual, such a taking occurs on the date of enactment of the legislation. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d at 1482; *De Anza Properties X, Ltd. v. Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991). Every instance of a beachcomber using the public easement does not constitute a separate taking, even though each use may inflict psychic or economic injury on the landowner.

The analysis of the present facts is similar. In their complaint, the Fallinis allege that the Wild Free-Roaming Horses and Burros Act deprived the Fallinis of their right to exclude wild horses from the developed water sources

on the Reveille Allotment. In light of those allegations, it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking.

The fact that the water at issue in this case is personality and the land at issue in the easement case was realty does not alter the nature of the analysis. For purposes of determining when the Fallinis' claim accrued, it is necessary in either case to look to the nature and timing of the governmental action that constituted the alleged taking. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d at 1481.

If the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking might well be different. *See Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 951 (1987). But the horses are not agents of the Department of the Interior any more than beachcombers wandering across a property owner's land are agents of the legislature that mandated the creation of an easement along the shore.

What the Fallinis may challenge under the Fifth Amendment is what the government has done, not what the horses have done. The only governmental action that could constitute a compensable taking in this case is the government's directive forbidding the Fallinis from shooing the horses away from the water that the Fallinis have produced at their developed water sources. That governmental action cannot be regarded as recurring with every new drink taken by every wild horse, even though the

consumption of water by the wild horses imposes a continuing economic burden on the Fallinis. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (proper focus, for statute of limitations purposes, "is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts became most painful"). Because the Fallinis identify the enactment of the Wild Free-Roaming Horses and Burros Act as the governmental action that prevented them from fencing the horses away from their water sources, and because they admit that they suffered injury from the date of enactment, their claim must be regarded as accruing long before they filed their present suit.

III

Based on our analysis of the Fallinis' takings claim, we conclude that their claim was time-barred. We therefore vacate the judgment and remand this case to the Court of Federal Claims with instructions to dismiss the complaint as untimely.

Each party shall bear its own costs.

VACATED AND REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5110

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of HELEN FALLINI as sole heir of HELEN FALLINI, deceased, executor of the last will of HELEN FALLINI, and Trustee of the HELEN FALLINI Living Trust and the HELEN FALLINI Living Trust as the sole distributee of the Last Will of HELEN FALLINI,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 92-809L

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

VACATED AND REMANDED WITH INSTRUCTIONS

ENTERED BY ORDER
OF THE COURT

DATED JUN 8 1995

/s/ Francis X. Gindhart, pt
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: November 15, 1995

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-809 L

SUSAN L. FALLINI, et al.,

v.

THE UNITED STATES

JUDGMENT

FILED MAR 15 1994

Pursuant to the court's order of March 11, 1994, allowing defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

David A. Lampen
Clerk of Court

March 15, 1994

By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-809L

(Filed: March 11, 1994)

SUSAN L. FALLINI, et al.,

Plaintiffs

v.

THE UNITED STATES,

Defendant

THIS ORDER WILL NOT BE PUBLISHED IN THE U.S. COURT OF FEDERAL CLAIMS REPORTER BECAUSE IT DOES NOT ADD SIGNIFICANTLY TO THE BODY OF LAW AND IS NOT OF WIDESPREAD INTEREST.

ORDER

Pursuant to order, oral argument on defendant's motion for summary judgment was heard on February 17, 1994, in the United States Court of Federal Claims, National Courts Building, Washington, D.C.

Appearances

For Plaintiffs: William F. Schroeder, Esq.
W. Alan Schroeder, Esq.

For Defendant: Dorothy R. Burakreis, Esq.
Laura Brown, Esq., Dept. of Interior

Relevant Papers:

Complaint, filed November 24, 1992

Answer, filed March 1, 1993

Defendant's Motion for Summary Judgment, with separately bound Appendix, filed June 3, 1993

Defendant's Proposed Findings of Uncontroverted Fact, filed June 3, 1993

Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, with separately bound Appendix (6 volumes, 1516 pages), filed September 1, 1993

Plaintiffs' Statement of Genuine Issues, filed September 1, 1993

Defendant's Reply in Support of Its Motion for Summary Judgment, filed September 28, 1993

Defendant's Supplemental Appendix in Support of Its Motion for Summary Judgment, filed September 28, 1993

Plaintiffs' Outline of Oral Argument on Defendant's Motion for Summary Judgment, filed pursuant to court order, February 17, 1994

At the close of argument, a bench ruling was made. The reasons for the decision were stated on the record and portions of defendant's June 2, 1993, motion for summary judgment, and September 8, 1993, reply were identified and adopted.

Plaintiffs operate a desert cow/yearling ranch operation utilizing an area of public lands known as the Reveille Allotment, Nye County, Nevada. Plaintiffs'

ranching operation includes 2,700 acres of private land, generally known as Twin Springs Ranch, that are intermingled with the public lands in the Reveille Allotment. The Reveille Allotment, administered by the Bureau of Land Management (BLM), Department of the Interior, is comprised of 657,520 acres. According to defendant, the Reveille Allotment contains a total of 57 developed water sources, and at least 47 undeveloped water sources.

Plaintiffs' ranch operation is of ancient origin. The most recent grazing permit, approved September 11, 1984, authorizes grazing on 657,520 acres of the Allotment, with a preference of 25,730 Animal Unit Months (AUMs). An AUM is defined as (1) the amount of feed required by an animal unit (one mature 1,000 lb. cow or equivalent) for one month, or (2) tenure of one animal unit for a period of one month. The Reveille Allotment is a desert area, and the grazing preference in AUMs is contingent on base waters controlled by the permittee. A base water is a water on federal land for which the permittee has a water right under state law, and which has been determined to support a certain number of AUMs. Range improvement permits allow development of water sources additional to base waters, but do not increase the number of permitted AUMs.

Since 1969, plaintiffs' grazing permits have permitted a total of 25,730 AUMs (approximately 2,144 head of mature cattle). Since 1976, the actual use in ranch operations has been at the full preference, 25,730 AUMs.

Prior litigation in 1986 by plaintiffs has established a herd management area (HMA) for wild horses on the Reveille Allotment that is based on historic location of

wild horses. The geographic boundaries of the HMA, and the herd population, were established by the court on the basis of a stipulation of the parties. *Fallini v. Hodel,* Civ. No. R 85-535 BRT. (D. Nev. Nov. 13, 1987). The HMA is comprised of 125,445 acres located within the Allotment, and there is and will continue to be only one wild horse herd use area within the Reveille Allotment. The HMA is to be managed for a herd population of between 145 and 165 wild horses. The stipulation provides that an annual census of the whole Reveille Allotment is required to be taken by the BLM, and written notice of the results of the census shall be sent to plaintiffs within 30 days of completion. Should a population of over 165 horses be determined to exist within the whole of the Reveille Allotment, BLM is required to remove the excess horses within 120 days. Should public range lands within the Reveille HMA substantially deteriorate, BLM retains discretion under applicable statute or regulation to make adjustments in the multiple uses of the Reveille HMA.

Defendant contends that since the 1986 litigation and entry of the stipulated judgment in 1987, BLM has conducted the required annual census and has removed the excess horses. BLM statistics show wild horse data as follows:

	Census	Removed	Remaining
1986	1300		
1987	1495	1214	281
1988	370	238	132
1989	269	105	164
1990	185	47	138
1991	195	54	141

In the complaint, plaintiffs contend that BLM, through its management of wild horses on the Reveille Allotment, has taken water owned by plaintiffs. Plaintiffs seek to recover the costs of producing the water that has been consumed by the wild horses. The complaint asserts claims for water consumed between 1972 and 1991 by wild horses (a) managed by BLM in excess of the numbers authorized by law ($757,922), and (b) managed by BLM within lawful limits ($160,324).

Alternatively, the complaint asserts claims for water consumed between 1987-1991 by wild horses (a) managed by BLM in excess of the numbers authorized by law ($94,204), and (b) managed b [sic] BLM within lawful limits ($69,900).

The total amount claimed for the 1972-1991 period is $918,246. The total amount claimed for the alternative 1987-1991 period is $164,104.

The complaint provides statistical data relative to water demand by wild horses that includes the following:

WATER DEMAND - WILD HORSES

Year	Horses	Allowed*	Horse Water Demand (gal. per year)		Total Water Demand**	% Horses	
			Total	Over Legal No.		Total	Over Legal No.
1971	126		551,880		6,665,630	8%	
1972	178	165	779,640	56,940	7,988,390	10%	1%
1973	238	165	1,042,440	319,740	8,868,648	12%	4%
1974	342	165	1,497,960	775,260	9,324,168	16%	8%
1975	463	165	2,027,940	1,305,240	9,854,148	21%	13%
1976	584	165	2,557,920	1,835,220	10,384,128	25%	18%
1977	703	165	3,079,140	2,356,440	10,905,348	28%	22%
1978	1,096	165	4,800,480	4,077,780	12,626,688	38%	32%
1979	1,414	165	6,193,320	5,470,620	14,019,528	44%	39%
1980	1,233	165	5,400,540	4,677,840	13,226,748	41%	35%
1981	1,590	165	6,964,200	6,241,500	14,790,408	47%	42%
1982	2,052	165	8,987,760	8,265,060	16,813,968	53%	49%
1983	2,238	165	9,802,440	9,079,740	17,628,648	56%	52%
1984	2,306	165	10,100,280	9,377,580	17,926,488	56%	52%
1985	2,195	165	9,614,100	8,891,400	17,440,308	55%	51%
1986	1,369	165	5,996,220	5,273,520	13,822,428	43%	38%
1987	1,533	165	6,714,540	5,991,840	14,540,748	46%	41%
1988	370	165	1,620,600	897,900	9,446,808	17%	10%
1989	243	165	1,064,340	341,640	8,890,548	12%	4%
1990	185	165	810,300	87,600	8,636,508	9%	1%
1991	195	165	854,100	131,400	8,680,308	10%	2%

*Under 1987 Court Order
** Cattle and Wild Horses

Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant has the burden of demonstrating that there are no genuine issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The movant can meet this burden by establishing that there is an absence of evidence on an essential element of the nonmovant's case. *Celotex Corp.*, 477 U.S. at 323; *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987). All reasonable inferences must be drawn against the party whose motion is under consideration. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The nonmovant must respond by producing affirmative evidence that a genuine issue of material fact does exist, and such an issue is determined to be genuine if a reasonable jury could resolve a factual matter in the non-movant's favor. *Sweats Fashions, Inc.*, 833 F.2d at 1562. A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law. *Dairyland Power Coop v. United States*, No. 93-5131, 1994 U.S. App. LEXIS 2632, at *10-11 (Fed. Cir. Feb. 15, 1994).

Disposition of plaintiffs' taking claims by summary judgment is appropriate. Although plaintiffs' grazing and range improvement permits confer the right to produce all the water that can be produced in the Allotment, plaintiffs did not have sole control and do not own water that is produced in excess of amounts needed to satisfy

the preference authorized for their permitted herd, 25,730 AUMs. Water produced in excess of the preference amount is subject to BLM range management standards, and historically has been available for all wildlife in the Reveille Allotment. Plaintiffs do not show an essential element of its taking claim: ownership of any of the water that has been consumed by wild horses during the period 1972-1991.

Plaintiffs base their claim of ownership of the water consumed by the wild horses on the circumstance that production of water under the grazing and range improvement permits reduces the water to plaintiffs' possession and control. *Osborne v. United States*, 145 F.2d 892 (9th Cir. 1944) provides a summary of the history of grazing on federal lands and assists in determining the status of plaintiffs' claim of ownership.

> In the pioneer or 'emigrant' days of western America immense areas of unappropriated and otherwise unused territory were freely used by stockmen for grazing. The government not only refrained from objecting to this practice but in various ways encouraged it and in time this privilege, to use the words of the Supreme Court in *Buford v. Houtz*, 133 U.S. 320, 326 [(1890)] . . . became . . . 'an implied license, growing out of the custom of nearly a hundred years. . . . ' This license was held to be the basis of various rights as between the licensee and other private individuals but not as between the licensee and the government.

Osborne, 145 F.2d at 894. While these permits create rights as between persons, which must be adequately safeguarded, "the Government for its own use may without

payment of compensation withdraw the permit privilege" entirely. *McNeil v. Seaton*, 281 F.2d 931, 934 (D.C. 1960). Under Nevada law, claims to water rights are subject to an adjudication procedure to determine the relative rights of users. Nev. Rev. Stat. §§ 533.090-533.320. Plaintiffs' water rights have not been established in Nevada judicial proceedings. Plaintiffs have not shown an ownership interest in the water consumed by wild horses that is not subject to BLM range management standards.

A necessary prerequisite to a taking claim is that plaintiffs demonstrate ownership or title to the property in issue at the time of the taking. *United States v. Dow*, 357 U.S. 17, 20 (1958); *Georgia-Pacific Corp. v. United States*, 568 F.2d 1316, 1319 (Ct. Cl.), *cert. denied*, 439 U.S. 820 (1978). The Supreme Court traditionally has resorted to " 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments. . . . " *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those existing rules or understandings is surely unexceptional.

Plaintiffs point out that their range improvement permits are limited to improvements "necessary to the management of the permitted livestock," as distinguished from a "cooperative arrangement" which is subject to mutual agreement. *See* 43 U.S.C. § 315c (1988). From this, plaintiffs argue that all of the water produced under the range improvement permits necessarily must be devoted

exclusively to requirements of the permitted herd, and not to achieve other range management objectives. Plaintiffs state:

> Neither the applications nor the permits in this case were for the purpose of 'achiev[ing] management objectives,' regardless of whose objectives they are construed to be. These applications and permits express as their only permitted purpose "the care and management of permitted livestock", just as prescribed by Congress, and the tangible improvement and the intangible water right are clearly private property unaffected by federal control so long as the purpose is being achieved and valid permit conditions are being met.

This argument is without merit. Plaintiffs' range improvement permits were approved in order to accommodate the "deferred rest rotation system" employed by plaintiffs to improve proper forage utilization and conform to BLM grazing policies. Plaintiffs' deferred rest rotation system implements BLM's range maintenance objectives. It is additional to the care and management of permitted livestock.

At various times since 1952, plaintiffs and their predecessors have applied for and obtained BLM range improvement permits for development of water sources on the Reveille Allotment. Developed water sources can consist of springs, pipelines, wells, reservoirs, ditches and catchments or be a combination of several of these. A water source is considered to be developed when a surface or subsurface water is manipulated to change the location, quantity, quality or period of availability.

Typically, plaintiffs' range improvement permits provide:

> 2. The permit does not accord to the permittee any preference, privilege, or consideration of any kind except as expressly provided herein.
>
> 3. The permit is subject to cancellation in whole or in part if the lands or portions thereof are withdrawn or reserved under a Public Land Order or are classified for disposal under any public land law, where such improvement or part thereof would interfere with the use of the land for the purposes of such withdrawal, reservation, or disposal.
>
> 4. The permittee will comply with the laws of the State within which the improvements are located with respect to water filings. . . .
>
> 5. Any public lands or impounded waters will be available for wildlife use and open to the public for hunting and fishing in accordance with State regulations. Such lands and waters shall also be open for other authorized public use to the extent that such use is consistent with the purpose for which the permit is granted.
>
> 6. Specifications for the improvements authorized by this permit *must* be approved by the Bureau prior to construction.

Like the grazing permit itself, range improvement permits are typically "subject to cancellation for noncompliance with the rules and regulations now or hereafter approved by the Secretary of the Interior, or where the

improvement would interfere with the range management practices determined by the Bureau of Land Management, or for a violation of any of the [permit's] terms. . . . "

As the Supreme Court has held in *United States v. Fuller*, 409 U.S. 488, 494 (1973), the Taylor Grazing Act (43 U.S.C. §§ 315 et seq.) expressly states that no compensable expectancy is created in the permit lands themselves as a result of permit issuance. Also, given the longstanding multiple-use mandate incorporated in all of the governing legislation, and in the terms of their permits, plaintiffs did not have a compensable expectancy in exclusion of wild horses and other wild animals from the allotment or exclusive use of the forage and water. Indeed, as the district court and the dissenting Ninth Circuit judge recognized in *Fallini v. Hodel*, 725 F. Supp. 1113, 1116 (D. Nev. 1989) and *Fallini v. Hodel*, 963 F.2d 275, 279-80 (9th Cir. 1992), the "plain meaning" of "wildlife" in the range improvement permit for the Deep Well included wild horses. Unlike the claim in *Fallini v. Hodel*, plaintiffs' claim here is not limited to the Deep Well, but rather encompasses all water sources, developed and undeveloped, on the Allotment. There are at least 47 undeveloped waters on the Allotment, as well as 57 developed waters under separate Section 4 range improvement permits. Given the undisputed presence of wild free-roaming horses on the allotment at the time these permits were issued, plaintiffs could not reasonably have expected to have exclusive use of the water or forage.

Plaintiffs ignore that any loss, or claim of a regulatory taking by the United States, must be evaluated in

light of: (1) the logically antecedent inquiry – in this case, whether there is a compensable expectancy to exclusive use of the allotment in the first instance, *Lucas*, 112 S. Ct. at 2901; and, (2) the definition of the property as a whole, the unit of property "whose value is to furnish the denominator of the fraction." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Concrete Pipe Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2290-91 (1993). Plaintiffs are silent in the face of the Supreme Court decisions in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978), and numerous other regulatory takings cases which uniformly reject the proposition that diminution in property value, standing alone, can establish a taking.

Plaintiffs' grazing permit and their range improvement permits expressly are subject to multiple use management of public lands under the Taylor Grazing Act, Federal Land Policy & Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1702(c), (k), and Public Range Lands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901(b)(2), 1902(d), (f), 1903(b), and compliance with all regulations "now or hereafter approved by the Secretary of the Interior." Clearly under these provisions, plaintiffs' range improvement permits are not limited to the "care and management of permitted livestock" as plaintiffs claim.

Contrary to plaintiffs' assertion, all of their Section 4 range improvement permits are expressly subject to regulations then existing as well as those subsequently approved by the Secretary. All of their Section 4 range improvement permits (43 U.S.C. § 315c) specifically state that "[a]ny public lands or impounded waters will be

available to wildlife use and open to the public for hunting and fishing in accordance with State regulations" and "also be open for other authorized public use" not inconsistent with the purpose of the permit. Under the regulations, installation and maintenance of range improvements must be consistent with multiple use management. 43 C.F.R. § 4120.3-1(a) (1992). "Range improvements" are defined as "an authorized activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock, wild horses and burros, and wildlife." 43 C.F.R. § 4100.0-5 (1992). Certainly, wild horses were present within the Reveille Allotment prior to enactment of the Wild Horses Act, and, furthermore, all of plaintiffs' range improvement permits are by their express terms subject to then existing and subsequently approved rules and regulations.

To succeed in establishing a compensable taking, plaintiffs must show a taking of economically viable use. While plaintiffs attempt to "shoehorn [their] claim into this analysis" by asserting that the water which the horses consumed was consumed in its entirety, the Supreme Court has flatly "rejected this analysis years ago in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978), where [it] held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 113 S.Ct. at 2290. Indeed, "[t]o the extent that any portion of property is taken, that portion

is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question." *Id.*

Plaintiffs cannot define their property as merely the portion that they claim was taken – merely the cost of providing water which was consumed by the horses. In fact, in their complaint, plaintiffs describe their ranch property as a whole as including exclusive rights to harvest forage on public land, public land range improvements, exclusive ownership of rights to appropriate all of the water, and their grazing "preference" on public land. Existing uses of their property are unaffected; their cattle have not been without forage or water. Plaintiffs do not dispute that since 1971, their total preference has remained at 25,730 AUMs, and actual use of the allotment since 1976 has been at the full preference.

On the basis of the foregoing, and on the statement made at the close of argument, defendant's motion for summary judgment must be allowed. The Clerk is directed to dismiss the complaint. No costs.

/s/ Kenneth R. Harkins
Kenneth R. Harkins,
Senior Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-809L

(Filed: November 20, 1995)

SUSAN L. FALLINI, et al.,

Plaintiffs

v.

THE UNITED STATES,

Defendant

ORDER

The June 8, 1995, decision of the United States Court of Appeals for the Federal Circuit was issued as a mandate on November 15, 1995. Pursuant to the CAFC decision and mandate, the judgment entered March 15, 1994, is vacated and the Clerk is directed to dismiss the complaint as untimely.

IT IS SO ORDERED.

/s/ Kenneth R. Harkins
Kenneth R. Harkins,
Senior Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-809L

SUSAN L. FALLINI, et al.,

v.

THE UNITED STATES,

JUDGMENT

Filed
NOV. 21, 1995

Pursuant to the court's order of November 20, 1995, vacating the judgment of March 15, 1994, and directing Clerk to enter judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

David A. Lampen
Clerk of Court

November 21, 1995 By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

William F. Schroeder, Esq.
Attorney of Record
P.O. Box 220
Vale, OR 97918

W. Alan Schroeder, Esq
of Counsel
P.O. Box 267
Boise, ID 83706

Lawyers for plaintiffs.

IN THE UNITED STATES CLAIMS COURT

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of Helen Fallini as sole heir of Helen Fallini, deceased, executor of the Last Will of Helen Fallini, and Trustee of the Helen Fallini Living Trust, and the Helen Fallini Living Trust as the sole distributee of the Last Will of Helen Fallini.	**92-809 C**
v.	Complaint for Just Compensation.
UNITED STATES OF AMERICA.	(28 U.S.C.1491)

Plaintiffs allege:

JURISDICTION

1. 28 U.S.C. Sec. 1491 provides that this Court shall have jurisdiction over any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or

upon any express or implied contract with the United States, *inter alia*. Jurisdiction over this claim is conferred by Section 1491 in that:

a. defendants are the United States and agents of the United States acting for an [sic] on behalf of the United States;

b. defendants Lujan and Jamison and their predecessors in Office are members of the executive department of the United States, and have acted by and under the authority of the executive department of the United States;

c. the acts of defendants alleged herein constitute a taking of property within the meaning of the Fifth Amendment of the Constitution of the United States for which compensation is due and owing. The causes of action alleging said taking is founded upon the Constitution of the United States. The provisions of the just compensation clause of the Fifth Amendment are self-executing, and the remedy established is the payment of compensation.

d. the claims herein stated involve management by defendants Lujan, Jamison, and their predecessors in Office, of wild free-roaming horses and in that management, requiring plaintiffs to provide water to sustain such horses. The claims involve the following Acts of Congress: *Wild and Free Roaming Horses and Burros Act*, 85 Stat. 649, as amended by the *Public Rangelands Improvement Act of 1978*, 92 Stat. 1803, 16 U.S.C. 1331-1340; *Taylor Grazing Act of 1934*, 48 Stat. 1269, as amended, 43 U.S.C. 315 et seq.; *Federal Land Policy and Management Act of 1976*, 90 Stat. 2743, 43 U.S.C. 1701, et seq.

PARTIES

2. Helen Fallini is the mother of Joseph B. Fallini, Jr. On July 8, 1983 she conveyed to Joseph B. Fallini, as Trustee, all of her right, title and interest in the property which is generally described in paragraph 3 pursuant to an agreement entitled the Helen Fallini Living Trust. She died on April 29, 1989, leaving Joseph B. Fallini as her only heir, as the executor of her last Will, and as said Trustee, the beneficiary by said last Will, of such property. Susan L. Fallini is the wife of Joseph B. Fallini, Jr.

3. On and after December 15, 1971 Helen Fallini was until her death, and Joseph B. Fallini, Jr. and Susan L. Fallini were and are citizens of the United States and residents of Nye County, Nevada. On and after December 15, 1971 and until July 8, 1983 they conducted, and on and after July 8, 1983 plaintiffs conducted and now conduct a livestock ranching business with their private land, cattle, machinery, equipment, money, credit, water rights, public land grazing preference, public land range improvements, and other property in said County and State.

4. On December 15, 1971 the *Wild Free-roaming Horses and Burros Act*, supra., was enacted as a law of the United States, wherein and whereby (as applied to this complaint) all wild free-roaming horses were declared to be under the jurisdiction of the Secretary of the Interior for the purposes of management as components of the public lands. Said Secretary administers the public lands through the Bureau of Land Management, a unit of the United States Department of the Interior. Defendant Manuel Lujan, Jr. is presently Secretary of the Interior and

defendant Cy Jamison is presently Director of the Bureau of Land Management. They are successors to previous Secretaries and Directors under whose administrations some of the actions alleged herein, occurred.

GENERAL ALLEGATIONS

6. The property described in paragraph 3 is, generally, the Twin Springs Ranch, and the public land grazing preference permits the owners to exclusively harvest forage with domestic livestock upon the Reveille Allotment. The property owners substantially invested in the acquisition of the preference and without it, the owners' property is valueless in the conduct of the business.

7. The Reveille Allotment is an administrative unit of public land within Nevada, administered by defendants. Within said Allotment are natural and developed water sources upon private and public lands which are necessary to sustain domestic livestock, and on and after December 15, 1971 plaintiffs were and are the exclusive owners of rights to appropriate all of such water. By reason of such right, plaintiffs own said grazing preference.

8. Such water is made available by the owners at the land surface to sustain domestic livestock by the expenditure of money for buildings, machinery, fuel and other associated expendables, electricity, equipment, tools, fences, gates, tanks, containers, air and ground vehicles, animal and human labor, public fees, and other service costs. On and after December 15, 1971 and through and including 1991 plaintiffs continuously expended money, and did so in every year as scheduled

within Exhibit A, being an *Analysis of Costs to Provide Water for Cattle and Wild Horses*, john S. Nalivka September 20, 1992.

9. Said *Wild and Free Roaming Horses and Burros Act*, supra., authorizes defendants to manage numbers of wild horses only to the extent that the natural ecological balance of the public lands will be achieved and maintained, to remove the excess, and prohibits defendants from relocating such animals to areas of the public lands where wild horses did not exist at enactment. By amendment enacted within the *Public Rangelands Improvement Act of 1978*, supra., defendants are required to immediately remove from a given area numbers which exceed those authorized by the Act. On November 28, 1986 the United States District Court for the District of Nevada required defendants to remove wild horses from described areas of the Reveille Allotment to which they had been relocated and to determine authorized numbers within the wild horse use area at enactment. Defendants thereupon determined that 165 horses was the maximum number of horses permitted by the Act within the Reveille Allotment.

10. Notwithstanding plaintiffs' entreaties and demands, defendants continuously failed and refused to provide water for the wild horses within their management or to reimburse plaintiffs for doing so and defendants required plaintiffs to provide water to wild horses whenever plaintiffs provided water to their domestic livestock after December 17, 1971, on penalty of loss of their grazing preference.

11. Notwithstanding plaintiffs' entreaties and demands, defendants failed to remove from the Reveille Allotment wild horses in excess of the number permitted by said Act and continued to manage horses continuously and in each year in numbers stated within Exhibit A.

FIRST COUNT

Taking of Property Without Just Compensation.

12. Paragraphs 1-11 are incorporated herein by reference as though fully set forth herein.

13. Assuming defendants' actions as alleged are lawful, they constitute a taking of plaintiffs' property for which compensation is due within the meaning of the Fifth Amendment to the United States Constitution.

14. Defendants have taken plaintiffs' property continuously to provide water to sustain wild horses managed by them in excess of lawful limits during each of the years between 1972 and 1991, inclusive, to the extent that was not determinable until November 28, 1986. The continuing taking in each year is stated within Exhibit A, **Water Cost Allocation,** Excess Horse Cost, Actual Cash Outlays.

SECOND COUNT

Taking of Property Without Just Compensation.

15. Paragraphs 1-11 and 13 are incorporated herein by reference as though fully set forth herein.

16. The *Wild and Free Roaming Horses and Burros Act*, supra., took plaintiffs' property to provide water to sustain wild horses managed by defendants within lawful limits in each of the years between 1972 and 1991, inclusive, to the extent that was not determinable until November 28, 1986. The taking in each year is stated within Exhibit A, **Water Cost Allocation,** (Total Horse Cost, Actual Cash Outlays) less (Excess Horse Cost, Actual Cash Outlays).

THIRD COUNT

Alternative (to First Count) Claim for Taking of Property Without Just Compensation.

17. Paragraphs 1-11 and 13 are incorporated herein by reference as though fully set forth herein.

18. Defendants have taken plaintiffs' property to provide water to sustain wild horses managed by them in excess of lawful limits in each of the years between 1987-1991, inclusive. The taking in each year is stated within Exhibit A, **Water Cost Allocation,** Excess Horse Cost, Actual Cash Outlays.

FOURTH COUNT

Alternative (to Second Count) Claim for Taking of Property Without Just Compensation.

19. Paragraphs 1-11 and 13 are incorporated herein by reference as though fully set forth herein.

20. The *Wild Free-roaming Horses and Burros Act*, supra., took plaintiffs' property to provide water to sustain wild horses managed by them within lawful limits in

each of the years between 1987-1991, inclusive. The taking in each year is stated within Exhibit A, **Water Cost Allocation,** (Total Horse Cost, Actual Cash Outlays) less (Excess Horse Cost, Actual Cash Outlays).

COMPENSATION CLAIM

21. Paragraphs 1-20 are incorporated herein by reference as though fully set forth herein.

22. As a result of defendants' actions, plaintiffs are entitled to compensation in at least the following amounts:

a. For continuously taking plaintiffs' property to provide water to wild horses managed by defendant between 1972-1991, inclusive, in excess of the numbers authorized by law, $757,922.

Or for the taking of plaintiffs' property to provide water to wild horses managed by defendant between 1987-1991, inclusive, in excess of the numbers authorized by law, $94,204.

c. For continuously taking plaintiffs' property to provide water to wild horses managed by defendant within lawful limits between 1972-1991, inclusive, $160,324.

Or for the taking of plaintiffs' property to provide water to wild horses managed by defendant within lawful limits between 1987-1991, inclusive, $69,900.

e. Interest on the compensation from the dates of the takings as determined by the Court.

Wherefore, plaintiffs pray as follows:

A. That the Court award compensation to plaintiffs for a taking of property in each of the years 1972-1991, inclusive, as alleged and in the aggregate, $918,246, or in such amounts as proved at trial, plus interest from the dates of taking as determined by the Court.

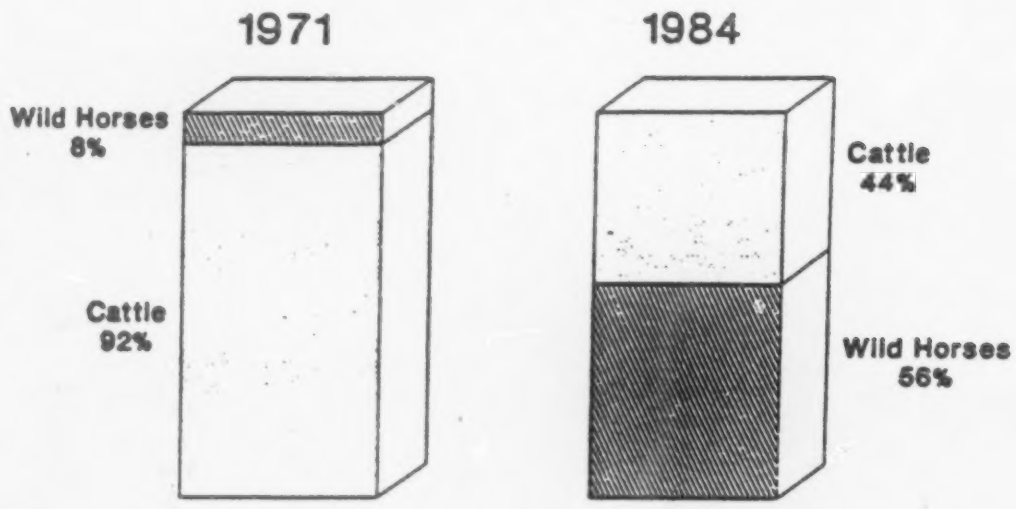
B. That the Court grant such other and further relief as it deems proper.

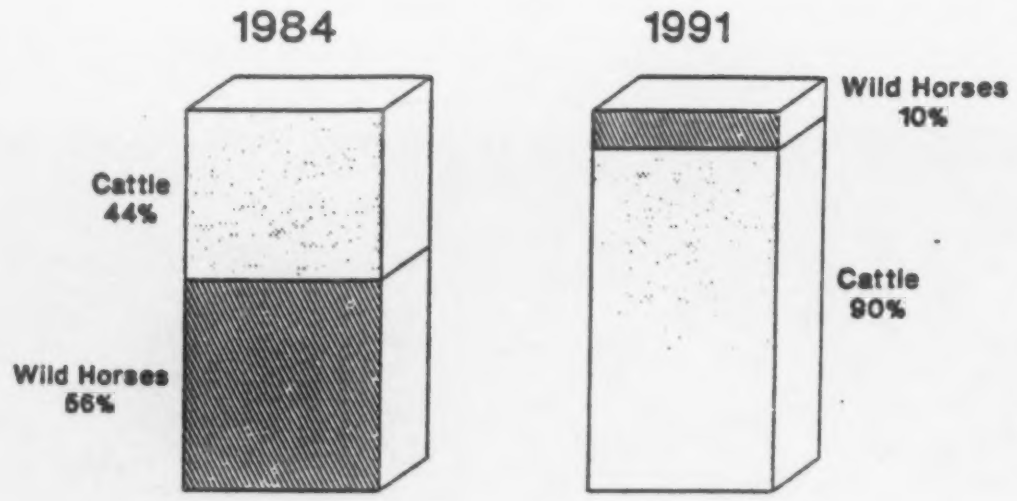
November 23, 1992.

/s/ William F. Schroeder
William F. Schroeder
(503)473-3141
Lawyer for plaintiffs.

Water Demand By Cattle and Wild Horses

Twin Springs Ranch



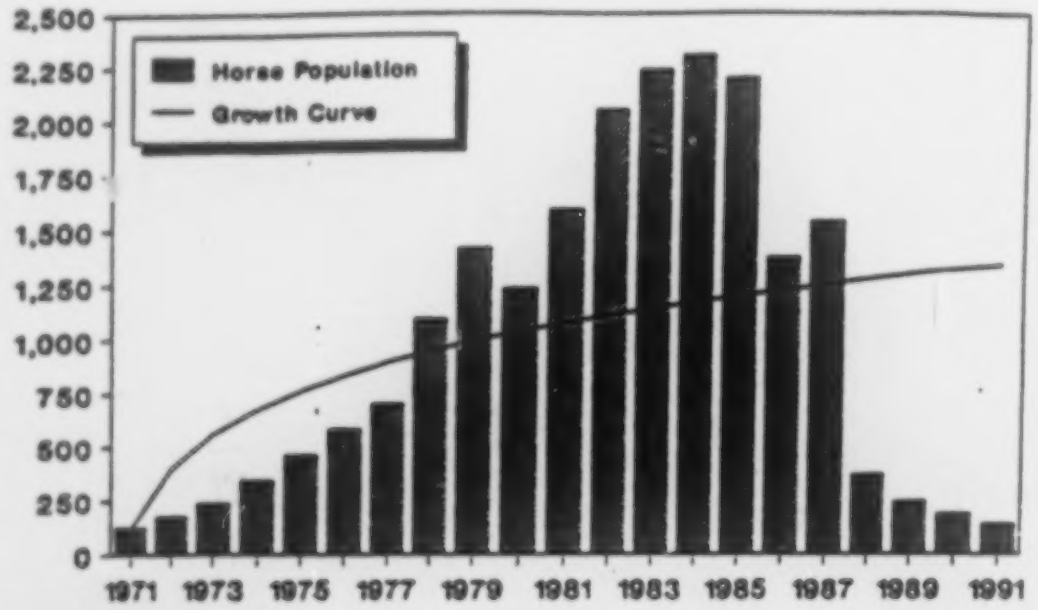


John Nalivka
Sterling Marketing, Inc.

EXHIBIT A, Page 1

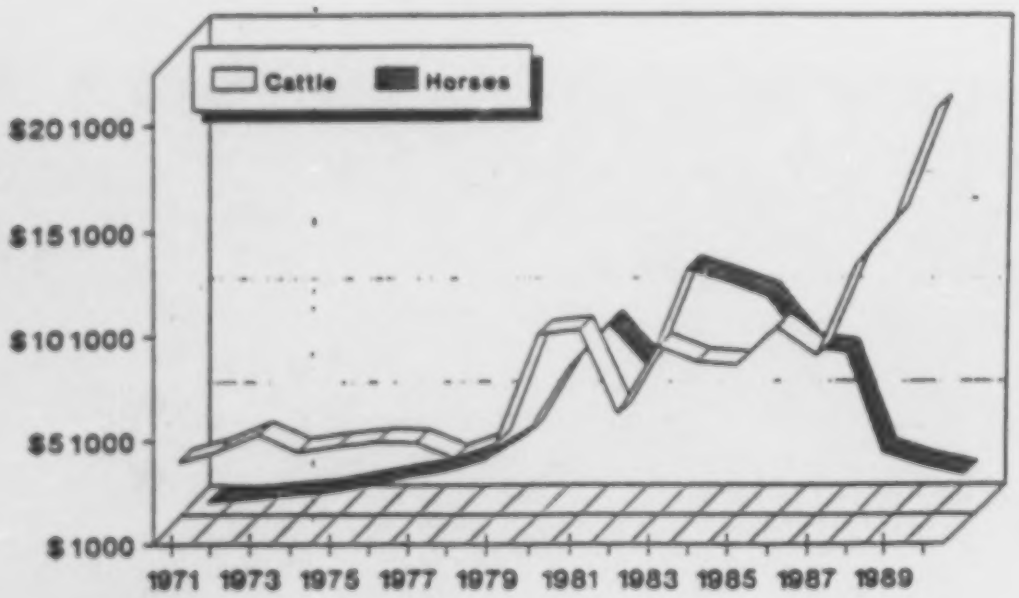
1681

Wild Horse Population
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

Total Cost to Provide Water
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

EXHIBIT A, Page 2

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WATER COST ALLOCATION: Cattle and Wild Horses

According to Annual Water Demand
Twin Springs Ranch

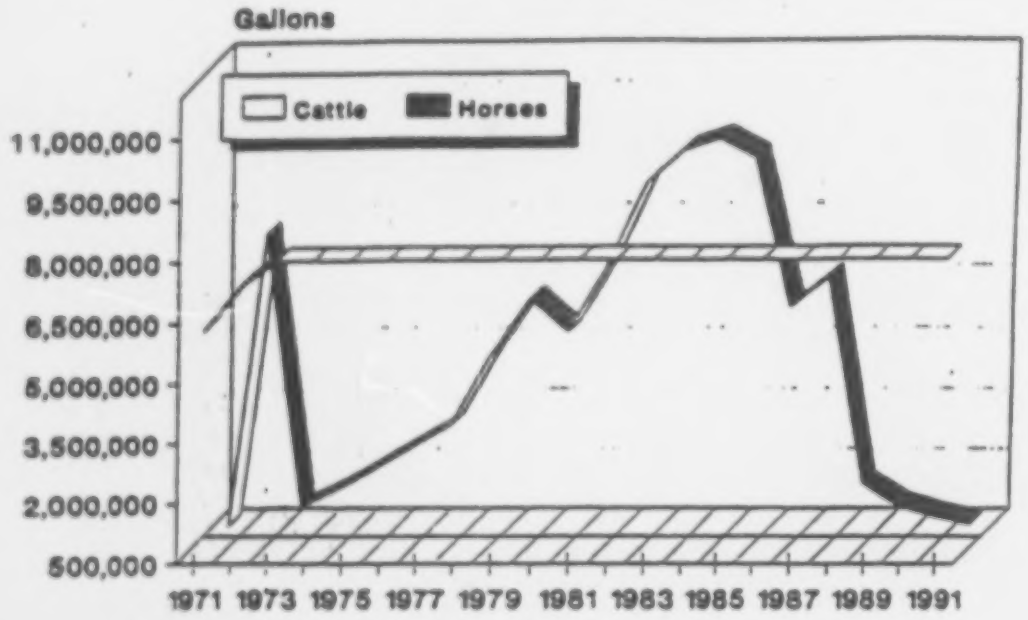
Year	Variable Cost	Fixed Cost	Total Cost	Cattle Demand	Total Cattle Cost	Horse Demand		Total Horse Cost			Excess Horse Cost		
						Total	Over legal number	Actual Cash Outlays	Opportunity Cost of Funds	Total Cost	Actual Cash Outlays	Opportunity Cost of Funds	Total Cost
				Percent		---- Percent ----							
1970	$18,803	$20,364	$38,967										
1971	17,199	23,145	40,344	92%	$37,004	8%	0%	$3,340	$202	$3,542	$0	$0	$0
1972	24,042	22,638	46,680	90%	42,124	10%	1%	4,556	236	4,792	333	17	349
1973	29,827	26,980	56,807	88%	50,130	12%	4%	6,677	580	7,257	2,048	173	2,221
1974	22,184	27,806	49,992	84%	41,981	16%	8%	8,031	758	8,789	4,157	381	4,538
1975	32,977	23,237	56,214	79%	44,648	21%	13%	11,569	876	12,445	7,446	556	8,002
1976	41,696	20,086	61,782	75%	46,583	25%	18%	15,219	998	16,217	10,919	711	11,630
1977	39,276	25,133	64,409	72%	46,223	28%	22%	18,186	1,140	19,326	13,918	869	14,787
1978	35,425	27,480	62,905	62%	38,990	38%	32%	23,916	2,102	26,018	20,315	1,777	22,093
1979	52,695	28,824	81,519	56%	45,507	44%	39%	36,012	3,674	39,686	31,810	3,238	35,048
1980	78,718	87,406	166,124	59%	98,295	41%	35%	67,829	6,185	74,014	58,752	5,362	64,115
1981	97,402	92,048	189,450	53%	100,245	47%	42%	89,204	14,995	104,199	79,947	13,411	93,358
1982	96,749	31,050	127,799	47%	59,485	53%	49%	68,314	11,030	79,344	62,821	10,093	72,914
1983	129,401	78,237	207,638	44%	92,181	56%	52%	115,457	13,281	128,739	106,945	12,289	119,234
1984	115,080	78,864	193,944	44%	84,870	56%	52%	109,273	14,743	124,017	101,454	13,683	115,138
1985	103,959	81,514	185,473	45%	83,229	55%	51%	102,243	9,195	111,438	94,558	8,508	103,065
1986	103,898	75,414	179,012	57%	101,356	43%	38%	77,856	5,446	83,102	68,296	4,816	73,112
1987	107,249	55,584	162,833	54%	87,841	46%	41%	78,192	5,387	80,579	67,099	4,804	71,903
1988	103,188	55,482	158,670	83%	131,450	17%	10%	27,220	2,527	29,747	15,081	1,541	16,622
1989	112,136	61,908	174,044	88%	153,208	12%	4%	20,836	1,843	22,679	6,888	649	7,337
1990	128,572	92,820	221,392	91%	200,620	9%	1%	20,772	1,796	22,567	2,248	230	2,475
1991	122,452	81,660	204,112	90%	184,029	10%	2%	20,084	1,381	21,464	3,090	209	3,299
1971–1991 Total	$1,593,826	$1,097,318	$2,691,144		$1,769,558			$921,588	$98,374	$1,019,961	$757,922	$83,318	$841,240

The opportunity cost of funds is calculated using the mid-year 1 year T-Bill rate.

3891

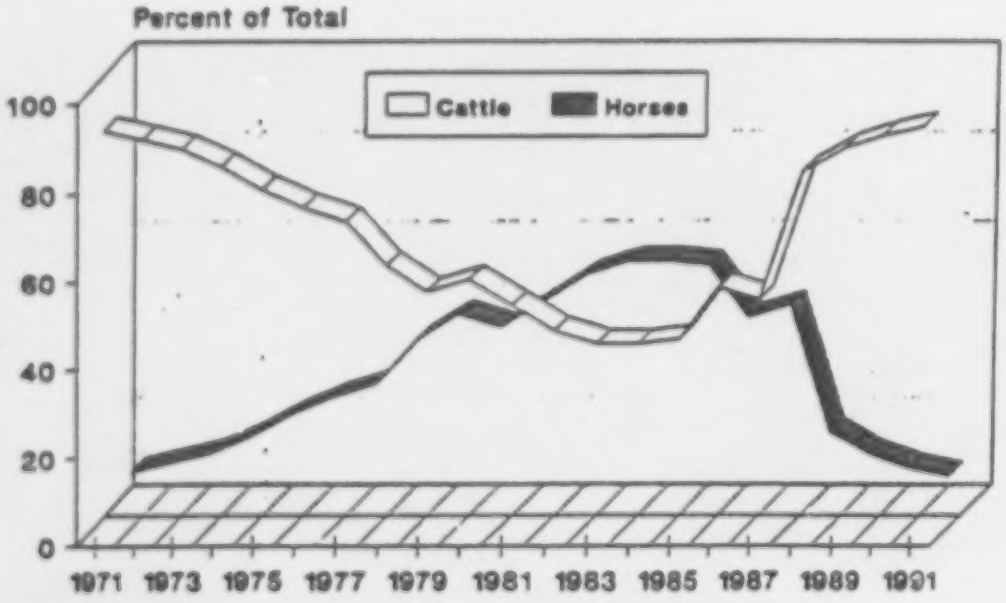
1983

Water Demand By Cattle and Wild Horses
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

Water Allocation to Cattle & Wild Horses
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

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1684

WATER DEMAND BY CATTLE AND WILD HORSES

Revaille Grazing Unit
Twin Springs Ranch

Year	Cattle AUM's	Cattle Water Demand Gal. per yr.	Horses (Number)	Allowed Under 1966 Court Order	Horse AUM's Total	Horse AUM's Over legal number	Horse Water Demand Total	Horse Water Demand Over legal number	Total Water Demand	% Cattle	% Horses Total	% Horses Over legal number
							--- gal.per yr. ---					
1971	20,100	6,113,750	126		1,512		551,880		6,665,630	92%	8%	
1972	23,700	7,208,750	178	165	2,136	156	779,640	56,940	7,988,390	90%	10%	1%
1973	25,730	7,826,208	238	165	2,856	876	1,042,440	319,740	8,868,648	88%	12%	4%
1974	25,730	7,826,208	342	165	4,104	2,124	1,497,960	775,260	9,324,168	84%	16%	8%
1975	25,730	7,826,208	463	165	5,556	3,576	2,027,940	1,305,240	9,854,148	79%	21%	13%
1976	25,730	7,826,208	584	165	7,008	5,028	2,557,920	1,835,220	10,384,128	75%	25%	18%
1977	25,730	7,826,208	703	165	8,436	6,456	3,079,140	2,356,440	10,905,348	72%	28%	22%
1978	25,730	7,826,208	1,096	165	13,152	11,172	4,800,480	4,077,780	12,626,688	62%	38%	32%
1979	25,730	7,826,208	1,414	165	16,968	14,988	6,193,320	5,470,620	14,019,528	56%	44%	39%
1980	25,730	7,826,208	1,233	165	14,796	12,816	5,400,540	4,677,840	13,226,748	59%	41%	35%
1981	25,730	7,826,208	1,590	165	19,080	17,100	6,964,200	6,241,500	14,790,408	53%	47%	42%
1982	25,730	7,826,208	2,052	165	24,624	22,644	8,987,760	8,265,060	16,813,968	47%	53%	49%
1983	25,730	7,826,208	2,238	165	26,856	24,876	9,802,440	9,079,740	17,628,648	44%	56%	52%
1984	25,730	7,826,208	2,308	165	27,672	25,692	10,100,280	9,377,580	17,926,488	44%	56%	52%
1985	25,730	7,826,208	2,195	165	26,340	24,360	9,614,100	8,891,400	17,440,308	45%	55%	51%
1986	25,730	7,826,208	1,369	165	16,428	14,448	5,996,220	5,273,520	13,822,428	57%	43%	38%
1987	25,730	7,826,208	1,533	165	18,396	16,416	6,714,540	5,991,840	14,540,748	54%	46%	41%
1988	25,730	7,826,208	370	165	4,440	2,460	1,620,600	897,900	9,446,808	83%	17%	10%
1989	25,730	7,826,208	243	165	2,916	936	1,064,340	341,640	8,890,548	88%	12%	4%
1990	25,730	7,826,208	185	165	2,220	240	810,300	87,600	8,636,508	91%	9%	1%
1991	25,730	7,826,208	195	165	2,340	360	854,100	131,400	8,680,308	90%	10%	2%

Exhibit A, Page 5 of 5

1985

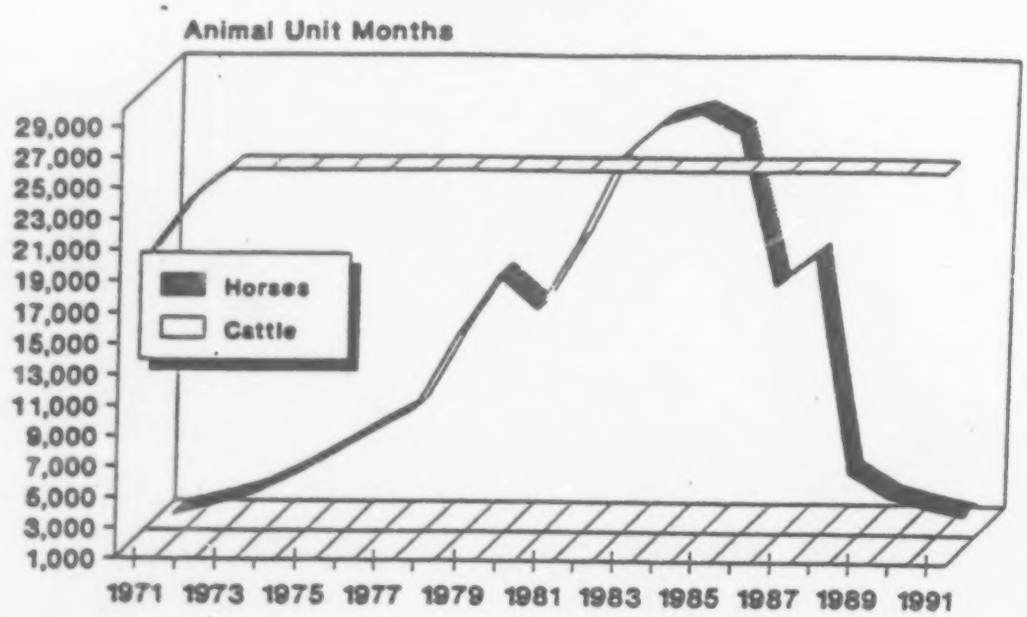
EXHIBIT 1691
Ely, Page 6

WATER DEMAND BY CATTLE AND WILD HORSES

Reveille Grazing Unit
Twin Springs Ranch

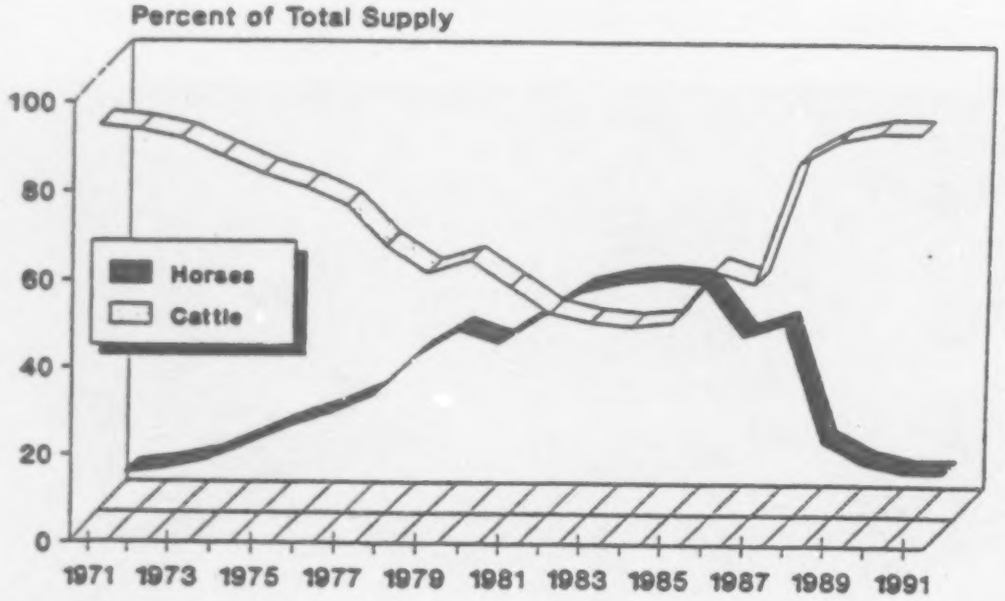
Year	Cattle AUM's	Horses (Number	Horse AUM's	Cattle Demand	Percent Increase Yr/Yr	Percent Increase From 1971	Horse Demand	Percent Increase Yr/Yr	Percent Increase From 1971	Total Water	Percent of Total Cattle	Percent of Total Horses
				Gal. / yr.			Gal. / yr.			Gal. / yr.		
1971	20,100	126	1,512	6,113,750			551,880			6,665,630	92%	8%
1972	23,700	178	2,136	7,208,750	18%	18%	779,640	41%	41%	7,988,390	90%	10%
1973	25,730	238	2,856	7,826,208	9%	28%	1,042,440	34%	89%	8,868,648	88%	12%
1974	25,730	342	4,104	7,826,208	0%	28%	1,497,960	44%	171%	9,324,168	84%	16%
1975	25,730	463	5,556	7,826,208	0%	28%	2,027,940	35%	267%	9,854,148	79%	21%
1976	25,730	584	7,008	7,826,208	0%	28%	2,557,920	26%	363%	10,384,128	75%	25%
1977	25,730	703	8,436	7,826,208	0%	28%	3,079,140	20%	458%	10,905,348	72%	28%
1978	25,730	1,096	13,152	7,826,208	0%	28%	4,800,480	56%	770%	12,626,688	62%	38%
1979	25,730	1,414	16,968	7,826,208	0%	28%	6,193,320	29%	1022%	14,019,528	56%	44%
1980	25,730	1,233	14,796	7,826,208	0%	28%	5,400,540	-13%	879%	13,226,748	59%	41%
1981	25,730	1,590	19,080	7,826,208	0%	28%	6,964,200	29%	1162%	14,790,408	53%	47%
1982	25,730	2,052	24,624	7,826,208	0%	28%	8,987,760	29%	1529%	16,813,968	47%	53%
1983	25,730	2,238	26,856	7,826,208	0%	28%	9,802,440	9%	1676%	17,628,648	44%	56%
1984	25,730	2,306	27,672	7,826,208	0%	28%	10,100,280	3%	1730%	17,926,488	44%	56%
1985	25,730	2,195	26,340	7,826,208	0%	28%	9,614,100	-5%	1642%	17,440,308	45%	55%
1986	25,730	1,369	16,428	7,826,208	0%	28%	5,996,220	-38%	987%	13,822,428	57%	43%
1987	25,730	1,533	18,396	7,826,208	0%	28%	6,714,540	12%	1117%	14,540,748	54%	46%
1988	25,730	370	4,440	7,826,208	0%	28%	1,620,600	-76%	194%	9,446,808	83%	17%
1989	25,730	243	2,916	7,826,208	0%	28%	1,064,340	-34%	93%	8,890,548	88%	12%
1990	25,730	185	2,220	7,826,208	0%	28%	810,300	-24%	47%	8,636,508	91%	9%
1991	25,730	195	2,340	7,826,208	0%	28%	854,100	5%	55%	8,680,308	90%	10%

Forage Demand By Cattle and Wild Horses
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

Forage Allocation to Cattle and Horses
Twin Springs Ranch



Prepared by John Nalivka
Sterling Marketing, Inc.
Lenexa, KS

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1687

FORAGE DEMAND

Cattle and Wild Horses
Reveille Grazing Unit
Twin Springs Ranch

Year	Cattle AUM's	Total Horses	Allowed Under 1986 Court Order	Horse AUM's Total	Horse AUM's Over legal number	Total AUM's	% Cattle	% Horses Total	% Horses Over legal number
1971	20,100	126		1,512		21,612	93%	7%	0%
1972	23,700	178	165	2,136	156	25,836	92%	8%	1%
1973	25,730	238	165	2,856	876	28,586	90%	10%	3%
1974	25,730	342	165	4,104	2,124	29,834	86%	14%	7%
1975	25,730	463	165	5,556	3,576	31,286	82%	18%	11%
1976	25,730	584	165	7,008	5,028	32,738	79%	21%	15%
1977	25,730	703	165	8,436	6,456	34,166	75%	25%	19%
1978	25,730	1,096	165	13,152	11,172	38,882	66%	34%	29%
1979	25,730	1,414	165	16,968	14,988	42,698	60%	40%	35%
1980	25,730	1,233	165	14,796	12,816	40,526	63%	37%	32%
1981	25,730	1,590	165	19,080	17,100	44,810	57%	43%	38%
1982	25,730	2,052	165	24,624	22,644	50,354	51%	49%	45%
1983	25,730	2,238	165	26,856	24,876	52,586	49%	51%	47%
1984	25,730	2,306	165	27,672	25,692	53,402	48%	52%	48%
1985	25,730	2,195	165	26,340	24,360	52,070	49%	51%	47%
1986	25,730	1,369	165	16,428	14,448	42,158	61%	39%	34%
1987	25,730	1,533	165	18,396	16,416	44,126	58%	42%	37%
1988	25,730	370	165	4,440	2,460	30,170	85%	15%	8%
1989	25,730	243	165	2,916	936	28,646	90%	10%	3%
1990	25,730	185	165	2,220	240	27,950	92%	8%	1%
1991	25,730	195	165	2,340	360	28,070	92%	8%	1%

EXHIBIT A, Page 8

1688

FORAGE DEMAND

Cattle and Wild Horses
Reveille Grazing Unit
Twin Springs Ranch

Year	Cattle AUM's	Percent Increase Yr/Yr	Percent Increase From 1971	Horses (Number	Percent Increase Yr/Yr	Percent Increase From 1971	Horse AUM's	Percent Increase Yr/Yr	Percent Increase From 1971	Total AUM's	Percent of Total Cattle	Percent of Total Horses
1971	20,100			126			1,512			21,612	93%	7%
1972	23,700	18%	18%	178	41.3%	41.3%	2,136	41.3%	41%	25,836	92%	8%
1973	25,730	9%	28%	238	34%	89%	2,856	34%	89%	28,586	90%	10%
1974	25,730	0%	28%	342	44%	171%	4,104	44%	171%	29,834	86%	14%
1975	25,730	0%	28%	463	35%	267%	5,556	35%	267%	31,286	82%	18%
1976	25,730	0%	28%	584	26%	363%	7,008	26%	363%	32,738	79%	21%
1977	25,730	0%	28%	703	20%	458%	8,436	20%	458%	34,166	75%	25%
1978	25,730	0%	28%	1,096	56%	770%	13,152	56%	770%	38,882	66%	34%
1979	25,730	0%	28%	1,414	29%	1022%	16,968	29%	1022%	42,698	60%	40%
1980	25,730	0%	28%	1,233	−13%	879%	14,796	−13%	879%	40,526	63%	37%
1981	25,730	0%	28%	1,590	29%	1162%	19,080	29%	1162%	44,810	57%	43%
1982	25,730	0%	28%	2,052	29%	1529%	24,624	29%	1529%	50,354	51%	49%
1983	25,730	0%	28%	2,238	9%	1676%	26,856	9%	1676%	52,586	49%	51%
1984	25,730	0%	28%	2,308	3%	1730%	27,672	3%	1730%	53,402	48%	52%
1985	25,730	0%	28%	2,195	−5%	1642%	26,340	−5%	1642%	52,070	49%	51%
1986	25,730	0%	28%	1,369	−38%	987%	16,428	−38%	987%	42,158	61%	39%
1987	25,730	0%	28%	1,533	12%	1117%	18,396	12%	1117%	44,126	58%	42%
1988	25,730	0%	28%	370	−76%	194%	4,440	−76%	194%	30,170	85%	15%
1989	25,730	0%	28%	243	−34%	93%	2,916	−34%	93%	28,646	90%	10%
1990	25,730	0%	28%	185	−24%	47%	2,220	−24%	47%	27,950	92%	8%
1991	25,730	0%	28%	195	5%	55%	2,340	5%	55%	28,070	92%	8%

EXHIBIT A, Page 9

6891

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5110

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of HELEN FALLINI as sole heir of HELEN FALLINI, deceased, executor of the last will of HELEN FALLINI, and Trustee of the HELEN FALLINI Living Trust and the HELEN FALLINI Living Trust as the sole distributee of the Last Will of HELEN FALLINI,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

(Filed Nov. 8, 1995)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 15, 1995.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: November 8, 1995 By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: WILLIAM F. SCHROEDER
PETER A. APPEL
JAMES L. HUFFMAN

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

No. 95-1257

In the Supreme Court of the United States

OCTOBER TERM, 1995

SUSAN L. FALLINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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LOIS J. SCHIFFER
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18pp

QUESTION PRESENTED

Whether petitioners' claim of an uncompensated regulatory taking of their property is barred by the applicable six-year statute of limitations, 28 U.S.C. 2501.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1257

SUSAN L. FALLINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 56 F.3d 1378. The opinion of the Court of Federal Claims (Pet. App. 17-32) is reported at 31 Fed. Cl. 53.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1995. A petition for rehearing was denied on November 8, 1995. Pet. App. 53-54. The petition for a writ of certiorari was filed on February 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before 1934, grazing on public lands was largely unregulated. "And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for [grazing] purposes. There thus grew up a sort of implied license that these lands * * * might be used so long as the Government did not cancel its tacit consent." *Light* v. *United States*, 220 U.S. 523, 535 (1911). Nevertheless, the failure of the United States to object to grazing on public lands "did not confer any vested right * * * nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." *Ibid.*

The unrestricted access to public lands for grazing led to substantial injury to those lands. Responding to the need to regulate private use of federal lands, Congress enacted the Taylor Grazing Act in 1934 "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range." Taylor Grazing Act, ch. 865, 48 Stat. 1269; see 43 U.S.C. 315-315r. The Taylor Grazing Act authorizes the Secretary of the Interior to establish "grazing districts," 43 U.S.C. 315, and to issue permits to graze livestock on such grazing districts, 43 U.S.C. 315b. As was the case with the unregulated grazing on public lands before 1934, grazing permits under the Taylor Grazing Act do not "create any right, title, interest, or estate in or to the [public] lands." 43 U.S.C. 315b; see also *United States* v. *Fuller*, 409 U.S. 488, 494 (1973).

The Taylor Grazing Act also authorizes the Secretary to issue permits for the construction of range improvements on federal grazing districts. 43 U.S.C. 315c. Under the Secretary's regulations, all range improvements must be made in a manner consistent with principles of multiple-use management governing federal lands. 43 C.F.R. 4120.3-1(a); see 43 C.F.R. 2420. Permit holders may install range improvements under either a cooperative agreement or a range improvement permit. 43 U.S.C. 315c. Under a cooperative agreement, the government and the permit holder agree on an allocation of costs and labor to construct and maintain the range improvement, and the government and the permit holder share title to the improvement in proportion to their respective contributions. 43 C.F.R. 4120.3-2(a). Under a range improvement permit, the permit holder pays for construction and maintenance of the improvement and holds title to the improvement. 43 C.F.R. 4120.3-3. As with grazing permits, range improvement permits and cooperative agreements do not convey to the permittee or cooperator any right, title, or interest in any lands or resources held by the United States. 43 C.F.R. 4120.3-1(e).

b. In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act (the Act), Pub. L. No. 92-195, 85 Stat. 649, 16 U.S.C. 1331 *et seq.* See generally *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). In enacting that legislation, Congress found

> that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and

> burros are fast disappearing from the American scene.

16 U.S.C. 1331. Congress declared that wild free-roaming horses and burros are "an integral part of the natural system of the public lands," *ibid.*, and directed the Secretary to "manage wild free-roaming horses and burros as components of the public lands." 16 U.S.C. 1333(a).

To implement those statutory dictates, the Secretary has issued regulations that define "range improvement" to include providing habitat for wild horses and burros. 43 C.F.R. 4100.0-5. The Secretary has also issued regulations to govern the "management of wild horses and burros as an integral part of the natural system of the public lands under the principle of multiple use." 43 C.F.R. 4700.0-2. The regulations prohibit activities harmful to wild horses or burros, including removing or attempting to remove a wild horse or burro from the public lands without authorization. 43 C.F.R. 4770.1.

2. Petitioners own a 2,700 acre ranch in Nye County, Nevada. Their lands are intermingled with public lands in an area called the Reveille Allotment, which comprises 657,520 acres. Petitioners have been issued a grazing preference (a priority position permitting grazing) on the Reveille Allotment to the extent of 25,730 Animal Unit Months (AUMs) per year, and they have actually used the full amount of their preference since 1976.[1] There are several water

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[1] An Animal Unit Month is defined as the amount of forage necessary to sustain one cow or its equivalent for one month. 43 C.F.R. 4100.0-5. Petitioners' preference is sufficient to sustain approximately 2,144 head of mature cattle. See Pet. App. 19.

sources on the Reveille Allotment, some developed and some undeveloped. For the developed water sources on public lands, petitioners have obtained range improvement permits allowing them to install equipment that produces the water. Pet. App. 18-19, 48.

Wild horses protected by federal law have roamed on the allotment of federal land where petitioners hold a grazing permit and constructed range improvements, and have consumed water from water sources on that allotment. The presence of those wild horses led to litigation in the 1980s between petitioners and the government. See, *e.g.*, *Fallini* v. *Hodel*, 725 F. Supp. 1113 (D. Nev. 1989), aff'd, 963 F.2d 275 (9th Cir. 1992); *Fallini* v. *Hodel*, 783 F.2d 1343 (9th Cir. 1986). In 1983, petitioner Joseph Fallini wrote a letter to the Bureau of Land Management (BLM), Department of the Interior, purporting to bill the government for the water that wild horses had consumed up to that point. Pet. App. 7.

3. Petitioners initiated this lawsuit in November 1992. Petitioners' complaint (Pet. App. 35-52) alleged that the United States took their property to provide water for the wild horses. Petitioners sought compensation for the water consumed, either from the date of the enactment of the Wild Free-Roaming Horses and Burros Act or from six years prior to the date of the complaint. *Id.* at 40-42.

The Court of Federal Claims granted summary judgment for the United States. Pet. App. 17-32. It held that petitioners owned no property interest in the water consumed by the horses, because they owned no water in excess of the amount necessary to satisfy their annual grazing preference of 25,730 AUMs. *Id.* at 24-25. The court also noted that, under

the Taylor Grazing Act, no compensable expectancy in use of the public lands is created as a result of the issuance of a permit. *Id.* at 29. Thus, it concluded that petitioners had no compensable expectancy in the right to exclude wild horses from the allotment. *Ibid.*

4. The court of appeals did not reach the merits of the trial court's conclusion. Rather, it held that petitioners' complaint should be dismissed because it had not been filed within six years after the cause of action accrued. Pet. App. 1-14. The court observed that, under the applicable statute of limitations, 28 U.S.C. 2501, a cause of action accrues "when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action." Pet. App. 6-7. It ruled that, at the latest, the cause of action accrued on October 3, 1983, when Joseph Fallini sent his "bill" to BLM. That action, it noted, demonstrated that petitioners were "aware of all the facts necessary to establish the liability of the United States for the alleged taking." *Id.* at 7.

The court of appeals rejected petitioners' two arguments to avoid the limitations bar. First, the court rejected petitioners' argument based on *United States* v. *Dickinson*, 331 U.S. 745 (1947), which involved the accrual of a cause of action against the United States after the government gradually flooded privately owned land. The court acknowledged that *Dickinson* held that the plaintiffs in that case were entitled to "postpone filing suit until the nature and extent of the taking [was] clear [and] * * * 'the situation [became] stabilized.'" Pet. App. 8-9. But based on this Court's subsequent decision in *United States* v. *Dow*, 357 U.S. 17, 27 (1958), the court of appeals concluded that *Dickinson* applies only "when it was uncertain at what stage * * * the land had

become appropriated to public use." Pet. App. 9. "In the case at bar," the court noted, "the 'permanent nature' of the taking was evident to [petitioners] at least by 1983, when they sent their water bill to the Bureau of Land Management." *Id.* at 11.

The court of appeals also rejected petitioners' contention that "every drink by every wild horse [is] a new and independent federal taking compensable under the Fifth Amendment." Pet. App. 12. The court of appeals rejected that argument as inconsistent with petitioners' theory that "the Wild Free-Roaming Horses and Burros Act deprived [them] of their right to exclude wild horses from the developed water sources on the Reveille Allotment." *Id.* at 12-13. "In light of those allegations," the court held, "it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking." *Ibid.* Accordingly, the court concluded that "governmental action cannot be regarded as recurring with every new drink taken by every wild horse, even though the consumption of water by the wild horses imposes a continuing economic burden on [petitioners]." *Id.* at 13-14. It therefore held that petitioners' claim "must be regarded as accruing long before they filed their present suit." *Id.* at 14.

ARGUMENT

1. In this Court, petitioners argue that the statute of limitations never runs on their claim as long as the purported regulatory taking is still ongoing. Analyzing a regulatory taking as "an ongoing, temporary taking of indeterminate duration" (Pet. 9), petitioners assert that a claim is timely at any point during the time the regulatory measure is in effect. In similar

fashion, they submit that a regulatory taking should be analyzed under the "continuing wrong" doctrine (Pet. 20-21), which (as they acknowledge) has not previously been applied to regulatory takings.

Petitioners did not present either of these theories to the panel of the court of appeals that decided this case. In its brief on appeal, the United States (as appellee) defended the merits of the trial court's decision and also argued that the claim was not timely. In their reply brief, petitioners relied on the *Dickinson* "stabilization" doctrine (see pp. 6-7, *supra*), and argued that their complaint was timely because the harm to them did not stabilize until November 28, 1986. See Pet. C.A. Reply Br. 24-25; see also Pet. App. 40 (¶ 14), 41 (¶ 16) (same position taken in petitioners' complaint). Only in their petition for rehearing did petitioners advance their current theory of the application of the statute of limitations to this case. Indeed, petitioners now concede that *Dickinson*, on which they relied before the panel, "is not the precedent which should control this case." Pet. 6. That inconsistency in petitioners' legal position is itself a significant factor weighing against review by the Court.

2. In any event, petitioners' arguments that their claim is not barred by the statute of limitations are without merit. Their principal argument is that, because a court cannot know whether the regulatory measure that allegedly amounts to a taking will be continued indefinitely or will be altered by amendment, a court cannot make a single, reasonably accurate determination of the just compensation that is due. Pet. 9-10. Petitioners suggest that a court presented with a regulatory taking claim will either overcompensate or undercompensate the person

whose property is taken, if it is required to evaluate the effect of the regulatory measure on the taken property at a single point. Pet. 14-15. Therefore, they contend, a court must be allowed to entertain a regulatory taking claim at any point while that regulatory measure is in effect.

Petitioners' argument cannot be squared with the language of the applicable statute of limitations, 28 U.S.C. 2501. Section 2501 provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim *first accrues*" (emphasis added). Congress's use of the words "first accrues" indicates that it intended that plaintiffs file actions as soon as they become aware of the facts giving rise to a claim (including a taking claim), and not wait until all the effects of the asserted taking, or other governmental action, are felt.

Furthermore, petitioners' policy arguments are mistaken. Courts are familiar with the concept of temporary takings and have a number of tools available to arrive at a determination of the value taken. See generally *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 657-658 (1981) (Brennan, J., dissenting); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 21 (1949); see also *United States* v. *Miller*, 317 U.S. 369, 373-376 (1943). If petitioners succeeded in persuading the courts that the regulatory measure amounted to a taking, the government would then have to decide whether to exercise its power of eminent domain, by paying the compensation necessary to make the regulation effective on a permanent basis, or to rescind the challenged regulation. In the latter event, if the court further concluded that the effect of

the regulation up to the time of rescission amounted to a temporary taking of property within the meaning of the Fifth Amendment, then the government would be required to compensate petitioners in some manner for the value of the property interest that was taken during the period in which the regulation was applicable to the property. See *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987).

Petitioners also err in arguing that the policies of statutes of limitations are not served by requiring claims like the one in this case to be presented at the earliest opportunity. As just explained, in the case of a regulatory measure, once the courts have determined that the challenged governmental action amounts to a taking for which no compensation has yet been provided, the government must decide whether to exercise its power of eminent domain through the payment of compensation, or to amend the regulation. Accordingly, early presentation of regulatory taking claims ensures that the challenged regulation is reevaluated promptly, and also ensures an opportunity for the government to limit its liability, if a temporary taking is found. By contrast, delay in determining that a regulatory measure amounts to a taking presumably would often increase the amount that the government would be required to pay in compensation for a temporary taking. That possibility, in particular, squarely implicates the government's (and the public's) interest in putting "an end to the possibility of litigation after the lapse of a reasonable time." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938).

Finally, this case does not involve a "continuing wrong," as petitioners contend (Pet. 20-21).

"A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *National Advertising Co.* v. *City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991), cert. denied, 504 U.S. 931 (1992); see also *Hart* v. *United States*, 910 F.2d 815, 818 (Fed. Cir. 1990). In *National Advertising*, the court held that a challenge under 42 U.S.C. 1983 to an ordinance banning off-premises outdoor advertising signs was barred by the applicable three-year statute of limitations, since the plaintiff was aware at the time of the ordinance's enactment that its signs would become nonconforming after the end of a five and one-half year "grace period" following enactment of the ordinance, yet it delayed suit until after that grace period expired. 947 F.2d at 1166-1168. The court stressed that "we have found no continuing harm violation where any harm to the plaintiff stemmed only from the initial application of a regulatory prohibition." *Id.* at 1167.

As the court of appeals in this case concluded, the taking in this case (if any taking occurred) is similarly "the government's directive forbidding [petitioners] from shooing the horses away from the water that [petitioners] have produced at their developed water sources." Pet. App. 13. That directive constitutes the alleged taking, and the drinking of water by the wild horses constitutes only the ensuing "injury" to petitioners' interests.[2] Under traditional

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[2] As the court of appeals explained, this case is analogous to one in which the government adopts a measure requiring landowners to allow members of the public to walk across their beachfront property, thereby effecting a taking of an easement over the property. See Pet. App. 12 (citing *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987)). In the latter

principles governing statutes of limitations, petitioners' cause of action "first accrued" on the date that the directive first affected their property interest, not when all the consequences were felt. Cf. *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). Petitioners' action is therefore untimely.

3. Even if the court of appeals erred in applying the statute of limitations to the facts of this case, review would nevertheless not be warranted because petitioners' taking claim is without merit. The undisputed evidence before the trial court demonstrated that petitioners have continued their ranching operation at their full preference of 25,730 AUMs every year since the enactment of the Act. Pet. App. 19. Petitioners have an interest only in the amount of water that they can put to beneficial use by virtue of their federal grazing preference, and they do not, in any event, have any right to water in excess of the amount needed to water their cattle. *Id.* at 25.

Petitioners have argued that their property has been taken because, to meet the water needs of the wild horses, they are effectively required to produce more water than is necessary to meet the needs of their cattle. Petitioners have not, however, been deprived of the economically beneficial use of whatever property interests they may have. They have shown merely that the Act has an impact on their cost of doing business. This Court has repeatedly ruled that

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situation, the taking occurs on the date the measure requiring public access becomes effective. "Every instance of a beachcomber using the public easement does not constitute a separate taking, even though each use may inflict psychic or economic injury on the landowner." Pet. App. 12.

such incidental economic effects of regulation do not themselves constitute takings of property. *Concrete Pipe & Products of Cal.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993); *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979); *Penn Central Transportation Co.* v. *New York*, 438 U.S. 104, 125 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996

(3)

No. 95-1257

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In The

Supreme Court of the United States

October Term, 1995

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of HELEN FALLINI as sole heir of HELEN FALLINI, deceased; as executor of the Last Will of HELEN FALLINI; as Trustee of the HELEN FALLINI Living Trust; and the HELEN FALLINI Living Trust as the sole distributor of the Last Will of HELEN FALLINI,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO STATEMENT[1]

Grazing use of the public lands was the subject of a sea change in the Taylor Grazing Act of 1934[2], and the Act did not merely continue the concept of government ownership, as the STATEMENT of the Government implies. It awarded a preference in the use to those private lands and waters which had become dependent upon the public land for grazing in the government encouraged settlement of the West. Although the grazing preference does not create any "right, title, interest, or estate in or to the [public] lands"[3], so long as the preference exists it is protected against cancellation or reduction except within the limits of the Secretary's regulations.

The grazing preference holder may also construct improvements upon the public land "necessary to the management of the permitted livestock"[4], but even before this Act the petitioners and their family predecessors in interest had constructed, maintained, and operated at

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[1] pp 2-8 of *Brief for the United States in Opposition*, hereinafter cited as "US ___".

[2] ch. 865, 48 Stat. 1269, 43 U.S.C. 315 *et seq.*

[3] 43 U.S.C. 315b. The associated regulation of the Secretary, 43 CFR 4120.3-1(e), purports to expand upon the Act to the extent that it provides, according to the STATEMENT of the government at 3, that a grazing permit does not convey any right, title, or interest in any lands "or resources" held by the United States. The extension is clearly wrong as to the forage resource which is obviously conveyed in the use of the preference for which payment is made.

[4] Id., §4, 43 U.S.C. 315c.

their substantial expense a large number of improvements which brought water to the surface of this desert environment, captured and confined the produced water, and distributed it for the sustenance of their livestock. The appropriation of the water did not (and does not) occur by federal authority; the controlling authority is the State of Nevada, the right to appropriate the water was acquired by petitioners and their predecessors from the State, and it is State law that recognizes private property in the appropriated water which has been reduced to possession by artificial means.[5]

Although the public lands are to be managed for multiple uses[6], not all of the public land or its assets need to (or can) simultaneously serve all of the multiple uses.[7] That management or range improvements must be "consistent" with the principle of multiple use does not require that one user be obligated to sustain the cost of other multiple uses, or even that every management tool or improvement must accommodate all of the multiple uses. A public land recreational user is no more obligated to pay the fee for grazing livestock than a grazing preference holder is obligated to provide sustenance to wild and free roaming horses and burros. Thus, a range

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[5] *Robbins v. City of Rapid City*, 23 N.W.2d 144, 148 (SD 1946); *Hagerman Irrigation Co. v. McMurray*, 113 P. 823 (N.M. 1911); *Stevens v. Oakdale Irr. Dist.*, 90 P.2d 58, 61 (Cal. 1939); see, also, *Spring Valley Water Works v. Schottler*, 28 L.Ed. 173, 182-184 (1884) (Fields, J. dissenting); *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 174 P. 852, 855 (Ut. 1918).

[6] Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U.S.C. 1701(a)(7).

[7] Id., 43 U.S.C. 1702(c).

improvement may not offend another multiple use, but it need not accommodate all of the multiple uses.

As the STATEMENT of the Government expresses, the Secretary has also authorized range improvements for many other purposes, including "providing habitat for wild horses and burros"[8], but this does not imply the petitioners' range improvements which were permitted for the watering of their livestock must also be dedicated at their expense to the sustenance of the wild horses and burros or every other use which the Government may choose to authorize upon the public lands.

From the time of the enactment of the Wild Free-Roaming Horses and burros Act in 1971[9] the petitioners were prohibited from protecting their water from the use of these animals because doing so would require activities which would constitute harassment of them. However, petitioners had no reason to believe that the Secretary would never satisfy the needs of the horses he was obligated to manage, but he never has. Therefore, as the petitioners opened their water supplies to the use of their livestock, the more aggressive wild horses consumed the water instead, and petitioners were required to produce water for their livestock and accomplish the permitted and required purpose of their grazing permit and range improvement permits.

The population of wild horses escalated and exhausted the forage and water resources within the area in which they were found at the time of the Act, and the

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[8] 43 CFR 4100.0-5.

[9] 85 Stat. 649, 16 U.S.C. 1331 *et seq.*

horses expanded from that area, finally into all of the Reveille Allotment. Because this mismanagement by the Secretary caused the prohibited relocation, the federal court on November 28, 1986 defined the area of the Reveille Allotment within which the horses were to be managed and fixed the maximum number of horses which could lawfully occupy the area and the allotment.

One element of the protected status created by the Act is the area of horse residence on December 15, 1971 and the grazing capacity of that area is the upward limit of the protected population of the Reveille Allotment. That is the number which would permit a thriving ecological balance of the public land resources, and this is the protected population. The Secretary had the obligation to establish that number, but he did not do so until December 1, 1986, after being compelled to do so by the federal court on November 28, 1986.[10] Until then, the protected population was unknowable and because it was

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[10] *Fallini v. Hodel*, No. R 85-535 BRT, Findings of Fact, Conclusions of Law and Judgment (D.Nev.Nov. 28, 1986), Joint Appendix for the Federal Circuit, at 1059, *et seq.* The Judgment, at 1078: "IT IS ORDERED that the Secretary of the Interior, its agents and employees, are enjoined and prohibited from managing wild horse herds in any area of the Reveille Allotment except that which is described in the court's findings of fact. IT IS ORDERED that within thirty (30) days from October 31, 1986, the State Director of the Bureau of Land Management will determine an optimum number of wild horses to be managed within the historical wild horse use area . . . taking into account guidelines established by Congress and this decision. IT IS ORDERED that before March 1, 1987 defendant Secretary of the Interior shall cause all wild horses in excess of the optimum number which he determines, to be removed from the Reveille Allotment." On December 1, 1986 the State Director complied.

unknowable, the taking was undefinable as to either population.[11] Following the order, the Secretary began removing horses and eventually brought the population down from more than 1200 to lawful numbers determined by the court to be between 145 and 165.

As the population enlarged from 126 in 1971 to 2,238 in 1983 the petitioners were pleading with the Secretary to provide water, and were litigating the Act in an effort to require the Secretary to assume his responsibilities, finally sending him a bill on October 3, 1983 for some of the past water cost. Until the court order on November 28, 1986 the Secretary did not recognize his duty to limit the population to the capacity of the area in which the horses were found at the time of the Act, to decide what that capacity was, and thereby determine what the maximum lawful population was to be in that area and in the Reveille Allotment.

Petitioners have not been inconsistent in their claim, as stated at US 7-8. Petitioners claimed separately for taking by the protected population and the unprotected population within and beyond the six years from their complaint. The Government challenged only the takings beyond the six years[12] until its reply brief suggested a

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[11] *Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 430.

[12] Answer, Second Defense, "Some of plaintiffs' claims are barred by the six-year statute of limitations."; Joint Preliminary Status Report, p. 5, "Defendant believes that the relevant issues are as follows. . . . 4. Whether any claim of a taking prior to November 24, 1986 is beyond the six-year statute of limitations." Defendants' Motion for Summary Judgment. Supporting Memorandum, p. 36. "Any claimed taking prior to

complete bar. The Court of Federal Claims completely ignored the jurisdictional claim, as did petitioners in their brief on appeal to the Federal Circuit. In its answering brief, the Government claimed that the 1983 Fallini bill showed knowledge of the obligation so as to commence the running of the Statute of Limitations as to all of petitioners' claims. But the jurisdictional defense did not become important until the oral argument before the Federal Circuit and the following petition for rehearing. The Government, not the petitioners, has been inconsistent in its defense to petitioners' claims.

REPLY TO ARGUMENT

1. The Government has mischaracterized petitioners' claim and thus fails to address the essential distinction between eminent domain and inverse condemnation on the one hand and a regulatory taking on the other. Petitioners do not assert that "the statute of limitations never runs on their claim as long as the purported regulatory taking is still ongoing." US 7. Rather, petitioners "argued that at a minimum they should be able to recover for the regulatory takings which occurred during the six years prior to the date on which their claim was filed." Pet. 4. This formulation of petitioners' claim reflects the continuing wrong associated with the ongoing, regulatory taking affected by the Secretary's administration of the Wild and Free-Roaming Horses and

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November 24, 1986 is beyond the six-year Statute of Limitations".

Burros Act, while also recognizing the important purposes of the statute of limitations.

2. In discussing the Tucker Act's six-year statute of limitations, the Government correctly states that Congress "intended that plaintiffs file actions as soon as they become aware of the facts giving rise to a claim . . . " US 9. That is precisely why a regulatory taking claim, like petitioners', cannot be said to have "first accrued" at a single point in time. As the history of the Government's administration of the Wild Free-Roaming Horses and Burros Act on petitioners' grazing allotment evidences, petitioners could not have been "aware of the facts giving rise to a claim" (US 9) when the Act was adopted or when the Secretary first adopted enforcing regulations. The application of the regulations changed dramatically since the Act was adopted with widely varying results for petitioners. The application of those regulations, which are subject to day-to-day enforcement by the Bureau of Land Management, can and probably will change in the future. The facts relevant to the continuing wrong suffered by petitioners became knowable as to their present complaint only after November 28, 1986 and will be knowable as to other complaints only as the Secretary continues to exercise his ongoing regulatory powers.

The Government's insistence that a claim under the Tucker Act "first accrues" for statute of limitations purposes "on the date that the directive first affected their property interest." (US 12) leads to the conclusion that "[i]f petitioners succeeded in persuading the courts that the regulatory measure amounted to a taking, the government would then have to decide whether to exercise its power of eminent domain . . . or to rescind the challenged

regulation." US 9. This conclusion ignores petitioners' central argument which is firmly rooted in the temporary taking doctrine of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

The point of the temporary taking doctrine is that government can, consistent with the Fifth amendment, engage in a regulatory taking without being forced to acquire the affected property through condemnation. To insist, as the Government does, that in the context of a regulatory taking, government faces a choice "to exercise its power of eminent domain through the payment of compensation, or to amend the regulation" (US 10), is to ignore the inevitable conclusion from *First English* that government can satisfy the Fifth Amendment's just compensation requirements without acquiring title to affected properties. If this is true with respect to the historic impacts of existing regulations, it must be equally true with respect to the future impacts of those same regulations. Government does have the option to rescind or amend the offending regulations or adjust its application of them, but failure to do so does not impose on the government the duty to acquire the property. By insisting that government must choose between condemnation and repeal of an offending regulation, the Government ignores the middle ground confirmed by the *First English* temporary takings doctrine. It is middle ground critical to the constitutional regulatory powers of both state and federal governments.

The Government argues that "early presentation of regulatory taking claims ensures that the challenged regulation is reevaluated promptly, and also ensures an opportunity for the government to limit its liability." US 10. Neither of these objectives will suffer if the Court adopts petitioners' position. If petitioners are permitted to recover only for losses incurred during the six years prior to the filing of their complaint, government's opportunities for regulatory reevaluation and limiting liability will be unaffected. But assuming reasonably clear taking doctrine, government has these opportunities on a constant basis. As petitioners have already argued, it would be unacceptable to assume "that the government will not comply with its responsibilities under the Fifth Amendment except when sued by property owners and ordered to compensate by a court." Pet. 17.

In quoting from *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938) on the objective of "putting 'an end to the possibility of litigation after the lapse of a reasonable time' " (US 10), the Government conveniently omits this Court's description of the statute of limitations as a "statute of repose, designed to protect the citizens from stale and vexatious claims. . . . " There is surely nothing stale or vexatious about a property owner's claim under the Fifth Amendment for the current effects of an ongoing regulation.

Finally, the Government insists that petitioners' losses are the continuing ill effects of the enactment of the Wild Free-Roaming Horses and Burrows Act, not a continuing violation. But the facts in this case are easily distinguishable from those in the cases cited by the Government. In *National Advertising Co. v. City of Raleigh*, 947

F.2d 1158, 1167 (4th Cir. 1991), the court of appeals recognized a continuing violation "where regulations continued to be applied to persons within the statutory limitations period." That is certainly the situation where the government has ongoing enforcement responsibilities affecting petitioners' daily production of water pursuant to its water rights under Nevada law.

3. As it has done in every prior proceeding in this case, the Government incorrectly asserts that petitioners' property claim is based upon federal law. ("Petitioners have an interest only in the amount of water that they can put to beneficial use by virtue of their federal grazing preference.") US 12. As this court confirmed in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992), property rights are defined by state law, in this case the water law of the State of Nevada. Under Nevada law, petitioners have a complete property interest in the water pumped from the federal land, captured in tanks and from those tanks distributed to troughs for the watering of their cattle, but which is instead consumed, a consumption which petitioners are forbidden to prevent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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